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87-332

No. 87-

In the Supreme Court of the United States

OCTOBER TERM, 1987

GARLAM ENTERPRISES CORPORATION,
PETITIONER,

v.

EXPLOSIVES CORPORATION OF AMERICA,
ROCKCOR, INC., AND
GENERAL INSURANCE COMPANY OF AMERICA,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether under 28 U.S.C. §1961 the term "date of entry of judgment" means that interest on a judgment is to be computed after resolution of all post-judgment motions for relief as held by the United States Court of Appeals for the First Circuit and seemly following the Second and the District of Columbia Circuits, or if the language of Section 1961 means that interest is to be computed from the date entry of Judgment on liability and/or damages is made pursuant to Rules 58 and 79(a), Fed. R. Civ. P. and without consideration of any post-judgment motions as held by the district court in the instant case following the decisions of the United States Court of Appeals for the Seventh, Eighth and Ninth Circuits, or whether the date a judgment starts accruing interest is determined by "equitable" considerations on a case-to-case basis as held by the Fifth Circuit?

2. Whether in a diversity action based on a contract dispute, the Court of Appeals' failure to compute interest under 28 U.S.C. §1961 according to Puerto Rico law conflicts with the decision of this Court in *Klaxon Co.* v. *Stentor Co.*, 313 U.S. 487 (1941)?

3. Whether the refusal of the courts below to award attorney's fees to the prevailing party (petitioner) as mandated by the express language found in the contract between the parties to this action, constitutes a judicial impairment of a valid contract and a departure from the accepted and usual course of judicial proceedings?

II

THE PARTIES

Petitioner is Garlam Enterprises Corporation ("Garlam"), the prime contractor on a highway construction project which gave rise to the instant lawsuit with the subcontractor and its surety.

Respondents are Explosives Corporation of America ("Explo"), Garlam's subcontractor on the highway construction project (which is now a dissolved and non-existent entity); Explo's parent or holding company, Rockcor, Inc. ("Rockcor"); and their surety, General Insurance Company of America ("GICA").

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Opinions Below

The prior opinions most pertinent to this petition are the April 30, 1987 Opinion of the United States Court of Appeals, 817 F.2d 894 (1st Cir. 1987), reproduced in the Appendix at 1a,[1] the unreported Order of the District Court for the District of Puerto Rico entered on May 21, 1986[2] (72a), and the unreported Opinion and Order of the district court filed on March 6, 1986 (76a).

Other opinions of the courts below reproduced in the Appendix are the unreported Orders of the Court of Appeals of

[1] Page references to the Appendix to this Petition are cited as "__a".

[2] The Order of the district court was dated May 19, 1987 and entered on May 21, 1987.

June 3, 1987 (66a) and May 9, 1983 (71a); the unreported Memorandum and Order of the Court of Appeals of October 10, 1985 (69a); the unreported Opinion and Order of the district court filed on November 16, 1982 (116a), and the Judgment of the district court entered on November 16, 1982 (165a).

Jurisdiction

The Judgment of the United States Court of Appeals for the First Circuit was entered on April 30, 1987 (63a). Rehearing and Suggestion for Rehearing En Banc was denied on June 3, 1987 (66a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Constitutional and Statutory Provisions Involved

This Petition involves the following statutory provisions fully set forth in the Appendix hereto: 28 United States Code §1961(a) (1987) (Interest); Rule 36, Fed. R. App. P. (Entry of Judgment); Rule 37, Fed. R. App. P. (Interest on Judgment); Rule 54, Fed. R. Civ. P. (Judgments; Costs); Rule 58, Fed. R. Civ. P. (Entry of Judgment); Rule 62, Fed. R. Civ. P. (Stay of Proceedings to Enforce Judgment); Rule 77(d), Fed. R. Civ. P. (District Courts and Clerks); and Rule 79(a), Fed. R. Civ. P. (Books and Records kept by the Clerk and Entries Therein). This petition also involves Article I, Section 10, of the Constitution of the United States which provides that "No state shall...pass any...Law impairing the Obligation of Contracts...", and Article II, Section 7 of the Constitution of the Commonwealth of Puerto Rico (Bill of Rights), which provides that "No laws impairing the obligation of contracts shall be enacted...."

Statement of the Case

I. Nature of the Case

This is a contract dispute case wherein petitioner, Garlam, proved to the courts below that Explo[3] breached its contract commitments and caused Garlam damages in excess of 2.4 million dollars.

II. The Proceedings Below

A. *The Proceedings in the District Court*

The dispute between Garlam and Explo commenced in 1971, a decade and a half ago. In January 1972, after breaching its contract with Garlam, Explo sued Garlam in the United States District Court for the District of Puerto Rico (Civil No. 72-0001), alleging breach of contract and seeking damages in the amount of $300,000. (A. 29-33).[4] Garlam counterclaimed against Explo and its surety, GICA, for Explo's breach and wilful non-compliance with the contract (A. 58-63).

The jurisdiction of the district court was invoked under 28 U.S.C. §1332 because of diversity of citizenship, the plaintiff being a citizen of the state of Washington, and the defendant a citizen of Puerto Rico.

By agreement between the parties, the case was bifurcated (A. 68) wherein the issue of liability was tried on January 26-30, 1976 before Judge W. A. Bootle, Senior U.S. District Court Judge of the Middle District of Georgia sitting by designation. On March 30, 1977, judgment on the liability issue was entered by Judge Bootle holding that Explo had breached its contract with Garlam and:

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[3] All references made regarding Explo are to be read as including Rockcor since Explo was substituted for Rockcor as judgment debtor, discussed *infra* at footnote 6.

[4] Page references to the 7-volume Appendix used before the Court of Appeals are cited "A. __."

> "...that the real reason for abandonment of the project by Explo was not any breach or failure of performance on the part of Garlam, but was Explo's decision to abandon what for it was proving to be an unprofitable contract." (A. 1482-1500).

Accordingly, judgment was entered against Explo and its surety, GICA, on the issue of liability; damages were to be proven at a later trial (A. 1500).

The parties stipulated that the issue of damages was to be referred to a Special Master (A. 1560-1564). After reviewing all the relevant evidence and holding an evidentiary hearing, on April 24, 1980, the Special Master found that Garlam sustained $2,423,177 in damages caused by Explo's breach (A. 1879-1896). On November 16, 1982, the district court entered judgment in favor of Garlam and against Explo and its surety in the sum of $2,423,177. In that judgment, the liability of Explo's surety, GICA, was fixed at the policy limits of $1,230,000 (166a n.1). Notwithstanding, the district court denied Garlam's motion for prejudgment interest, costs, and attorney's fees.

The judgment of the district court was set forth in a separate document (165a) and immediately entered in the Court's civil docket (A. 18) pursuant to the mandate of Rules 58 and 79(a), Fed. R. Civ. P. Timely notice of the entry of the judgment was given by the clerk of the district court to the parties pursuant to Rule 77(d), Fed. R. Civ. P.

On November 24, 1982, eight (8) days after the entry of judgment on damages against Explo and its surety, Explo filed a motion without supporting brief seeking post-judgment relief under Rules 52(b) and 59, Fed. R. Civ. P. (A. 3012-3014). On February 16, 1983, the Court denied Explo's motion as untimely because the motion was in reality a disguise meant only to obtain an enlargement of the jurisdictional term to file a post-judgment motion (A. 3122-3126).

Explo's motion was also denied as vague and speculative (A. 3541). On March 17, 1983, Explo then filed a Notice of Appeal from the November 16, 1982 judgment and the district court's order denying its Rule 52(b)/59 motion of November 24, 1982 (A. 3127). The First Circuit Court of Appeals marked that appeal as Appeal No. 83-1218.

While Explo's Rule 52(b)/59, Fed. R. Civ. P., motion was pending, Garlam filed a Rule 25, Fed. R. Civ. P., petition on December 15, 1982 to substitute Explo for Rockcor as a judgment debtor (A. 2980-90).[5] Explo opposed Garlam's Rule 25 motion and a three year legal battle ensued, "prompted in part by Rockcor's obstinacy in failing to even recognize the court's jurisdiction to determine whether substitution was proper" (83a).

In the interim, Garlam explained to the First Circuit Court of Appeals that it considered Explo's appeal No. 83-1218 premature because Garlam's Motion for Substitution was still pending before the district court and therefore, the district court's judgment was not final for purposes of appeal. On May 9, 1983, Explo's appeal No. 83-1218, was dismissed as premature because the Court of Appeals understood that the judgment was not final since Garlam's Rule 25 petition was still pending resolution (71a).

More than two (2) years later, on August 7, 1985, the district court denied Garlam's Rule 25, Fed. R. Civ. P., motion for substitution (A. 3421-35).[6] On August 15, 1985, Explo filed its second motion for post-judgment relief of the November 16, 1982 judgment under Rules 59/52(b), Fed. R. Civ. P. In that motion, Explo used identical arguments as

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[5] The district court made an express finding that the November 16, 1982 judgment was final (76-115a), and thus, it denied Garlam's motion for reconsideration of the Court's refusal to sustain a third party complaint against Rockcor, but gave leave to Garlam to file a *post-judgment* motion for substitution under Rule 25, Fed. R. Civ. P. (A. 2980-2990).

[6] The First Circuit Court of Appeals reversed the district court and held substitution under the facts of this case was proper. Hence, Explo was substituted by Rockcor as a judgment debtor.

those previously set forth in its first motion and which had been denied by the district court three (3) years earlier. In its second attempt, however, Explo argued that it filed its Rule 52(b)/59 motion within ten (10) days of what Explo now considered to be the "final judgment", i.e., the district court's post-judgment entry of an Opinion and Order denying Garlam's motion for substitution under Rule 25, Fed. R. Civ. P.

On August 16, 1985 (one day after Explo filed its second motion for post-judgment relief), Garlam filed a notice of appeal from the district court's Opinion and Order denying Garlam's motion for substitution. However, the Court of Appeals dismissed as premature Garlam's appeal, Appeal No. 85-1673, because it found that Explo's second motion under Rules 52(b)/59, Fed. R. Civ. P., was pending resolution and hence, the district court's judgment was not "final" (69a).

Notwithstanding, the district court viewed the order of the Court of Appeals as:

> "...a voluntary declination of their jurisdiction to entertain an appeal of this case rather than a determination of its finality for other purposes of law (e.g., computation of interest). The November 16, 1982 judgment disposed of *all* claims against *all* parties..." (emphasis in the original) (85a).

On March 6, 1986, the district court denied Explo's second motion for post-judgment relief under Rules 52(b)/59, Fed. R. Civ. P. Subsequently, Explo and GICA filed timely Appeals Nos. 86-1303 and 86-1650 to the United States Court of Appeals for the First Circuit. On April 1, 1984, Garlam timely filed Cro[illegible] Appeal No. 86-1362.

On May 19, 1986, the district court denied GICA's motion for stay of execution of judgment since its proposed supersedeas bond did not include the interest from November 16, 1982; the date the district court considered was the date of entry of judgment for purposes of interest computation (72a-

75a). The district court rejected GICA's argument that the November 16, 1982 Judgment was not "final". In its Order the district court stated:

> "Adopting the interpretation of GICA of the appellate court's finality rulings to deprive Garlam of its statutory right to obtain interest on the November 16, 1982 judgment would defeat the purposes of section 1961, diminish its obvious relevancy to this case, and serve as a windfall profit for GICA who would again (sic) (gain) from the earnings produced by the 1.3 million it has retained for more than thirty-six months. That judgment was set forth in a separate document, as required by Rule 58, Federal Rules of Civil Procedure, and it disposed of all pending matters. It adjudicated the liability of Plaintiff and of its surety and specified the exact amount of their liability to Garlam. This judgment was entered by the clerk in the case docket on November 17, 1982, as required by Rule 79(a), Federal Rules of Civil Procedure. There is no reason for denying Garlam the rights provided by section 1961 and allowing GICA to profit on the basis of the rulings of the Court of Appeals on finality made for completely different purposes (that of limiting appellate jurisdiction)." (74a-75a).

B. *The Decision of the Court of Appeals*

The United States Court of Appeals for the First Circuit affirmed in part and reversed in part the judgment of the district court. The Court of Appeals affirmed the judgment of the district court on liability and damages; reversed the order of the district court as to the date from which interest was to be computed and remanded to recompute interest starting March 6, 1986, the date respondents' second post-judgment motion under Rules 52(b)/59, Fed. R. Civ. P., was denied. The Court of Appeals also reversed the Order of the district

court regarding Garlam's motion for substitution and ordered Explo be substituted for Rockcor as a judgment debtor; and affirmed the Order of the district court denying Garlam attorney's fees, costs, and prejudgment interest (61a).

This petition addresses the decision of the Court of Appeals insofar as that decision reverses the order of the district court regarding the date from which interest is to be computed and also contests the appellate court's decision confirming the order of the district court which disregarded an express contract provision mandating attorney's fees.

The First Circuit Court of Appeals reversed the May 19, 1986 order of the district court, which order held that interest on damages was to be computed from the date judgment was entered, November 16, 1982, pursuant to Rules 58 and 79(a), Fed. R. Civ. P. The Court of Appeals reasoned that the judgment was not "final" because post-judgment motions for equitable relief were pending resolution by the district court and it did "not deem it advisable. . . to decide that final judgment meant one thing for appeal and another for the computation of interest" (42a).

Finally, the Court of Appeals affirmed the district court's refusal to grant Garlam attorney's fees, and costs, notwithstanding the fact that the contract between the parties mandated payment of attorney's fees and that costs had been granted by Judge Bootle after the first trial on the issue of liability. The Court of Appeals never addressed the uncontested fact that under the Garlam-Explo contract "reasonable legal fees" shall be paid to the prevailing party (Petitioner). (A. 4017).

Summary of Argument

This case merits review because:

1. seven circuit courts of appeals have rendered conflicting and differing decisions regarding the date a judgment begins to accrue interest under 28 U.S.C. §1961(a) (1987), such conflicts should be authoritatively ended by this Court to cause a uniformity of decisions;

2. four dissenting United States Supreme Court Justices previously felt that the identical issue now before this Court raises a question "of considerable importance for the proper and uniform administration" of a federal statute, *Briggs* v. *Pennsylvania Ry.*, 334 U.S. 304, 313 (1948);
3. the members of the Advisory Committee on Appellate Rules have flatly stated, in their commentaries to Rules 36 and 37, Fed. R. App. P., that "uncertainty" and "confusion" exists as to the meaning of the term "entry of judgment" under 28 U.S.C. §1961 for purposes of attaching interest;
4. in a diversity action based on a contract dispute, the Court of Appeals' failure to compute interest under 28 U.S.C. §1961 according to Puerto Rico law conflicts with the decision of this Court in *Klaxon Co.* v. *Stentor Co.*, 313 U.S. 487 (1941), said case held that in diversity cases interest is to be computed according to State law;
5. if the decision of the Court of Appeals is allowed to stand, the prevailing party to a lawsuit will not receive any compensation for the loss of the use of its money judgment and for the expenses incurred until the judgment becomes final for purposes of appeal, while the judgment debtor will be encouraged to deliberately prolong the case in order to profit by keeping the prevailing party's money, interest free, hence settlements by defendants will be discouraged and protracted litigation encouraged; and
6. the refusal of the courts below to award petitioner attorney's fees as mandated by the express language found in the contract between the parties constitutes a judicial impairment of a valid contract and a departure from the accepted and usual course of judicial proceedings. The district court's power to impair valid contracts should be clarified by this Court.

Reasons for Granting the Writ

I. THE DECISION OF THE FIRST CIRCUIT COURT OF APPEALS THAT UNDER 28 U.S.C. §1961 THE TERM "ENTRY OF JUDGMENT" MEANS THAT INTEREST ON A JUDGMENT IS TO BE COMPUTED *After* RESOLUTION OF ALL POST-JUDGMENT MOTIONS FOR EQUITABLE RELIEF RATHER THAN FROM THE DATE ENTRY OF JUDGMENT ON LIABILITY AND DAMAGES (MADE PURSUANT TO RULES 58 AND 79(a), FED. R. CIV. P.) IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH THE MANDATE OF OTHER FEDERAL COURTS OF APPEALS ON THE SAME MATTER, AND HAS GIVEN RISE TO AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. *There Are Now Conflicting and Irreconcilable Opinions of the First, Second, Fifth, Seventh, Eighth, Ninth, and District of Columbia Circuit Courts of Appeals Regarding the Proper Date for Accrual of Interest Under 28 U.S.C. §1961.*

Although the First Circuit Court of Appeals found merit in the district court's opinion on interest and the existence of case law precedent awarding interest from the date of the judgment on liability and damages, it concluded that all post-judgment motions must first be resolved before said judgment can accrue interest pursuant to 28 U.S.C. §1961 (33a-42a). Consequently, the Court of Appeals ordered that interest be recomputed starting March 6, 1986, the date the district court denied respondents' post-judgment motion for relief under Rules 52(b)/59, Fed. R. Civ. P., rather than from November 16, 1982, the date the district court entered judgment on liability and damages pursuant to Rules 58 and 79(a), Fed. R. Civ. P.

The end result was to penalize Garlam (the petitioner) and reward the judgment debtors (respondents) with the use of an interest-free sum in excess of 2.4 million dollars for almost four

years after the entry of judgment on damages and almost ten years after the entry of judgment on the issue of liability. That result is in direct and irreconcilable conflict with the decisions of the several courts of appeals that have rendered different and varying interpretations regarding the meaning of 28 U.S.C. §1961, to wit: the Second, Fifth, Seventh, Eighth, Ninth, and District of Columbia Circuit Courts of Appeals. The courts below should not be allowed to continue to render conflicting opinions. Therefore, this Honorable Court should grant the instant writ of certiorari in order to bring about uniformity of decisions among the seven federal circuit courts of appeals as to the meaning of the term "entry of judgment" under 28 U.S.C. §1961 for purposes of computing post-judgment interest.

1. *The Opinion of the Second Circuit Court of Appeals.*

The Second Circuit has interpreted 28 U.S.C. §1961 to permit allowance of interest only from the date of entry of judgment on the appellate court mandate, *Caputo* v. *United States Lines Co.*, 311 F.2d 413 (2d Cir.), *cert. denied sub nom.*, *Imparato Stevedoring Corporation* v. *United States Lines Co.*, 374 U.S. 833 (1963); *Powers* v. *New York Central Railroad*, 251 F.2d 813, 818 (2d Cir. 1958). However, by narrowly construing section 1961, the Second Circuit failed to take into account that the purpose, as recognized by other courts of appeals, of awarding interest since the date of the district court's entry of judgment is to avoid giving the judgment debtor a windfall profit through the use of the prevailing party's money, interest-free. Thus, the reasoning of the Second Circuit has been flatly rejected by the other circuits.

2. *The Opinions of the Ninth and the District of Columbia Circuit Courts of Appeals.*

The Ninth Circuit Court of Appeals reasoned in *Turner* v. *Japan Lines Ltd.*, 702 F.2d 752 (1983) that the purpose of awarding post-judgment interest is to compensate the "wronged

person" (petitioner) for the loss of the use of a money judgment from the date of ascertainment of damages until payment by defendant (respondents). *Id.* at 756. After examining the case law of the Second and Fifth Circuits, among others, the court questioned the basis behind *Hooks* v. *Washington Sheraton Corp.*, 642 F.2d 614 (DC Cir. 1980), cited with approval by the First Circuit.[7] The Ninth Circuit Court of Appeals agreed with the dissenting judge in *Hooks*, 642 F.2d at 618-21, that:

> "Neither case law nor statute suggests that a judgment must be final for purposes of an appeal before it can be a judgment for other purposes". *Turner*, 702 F.2d at 757 n.6.

Thus, the Ninth Circuit rejected the notion that principles of "finality" have a proper role to play in the calculation of post-judgment interest under 28 U.S.C. §1961. *Id.* In the instant case, the First Circuit Court of Appeals squarely rejected the Ninth Circuit's opinion and held to the contrary; it mandated that the judgment must be final and appealable (i.e., that all post-judgment motions be exhausted) before interest attaches. The Ninth Circuit reasoned that since Rule 58, Fed. R. Civ. P., provides that "regardless of any post-verdict motions, upon a general verdict of a jury . . . the clerk,

[7] *Hooks, supra*, is distinguishable from the present case in that third party claims were pending before the district court and hence, there was no valid entry of judgment unless that court made a certification under Rule 54(b), Fed. R. Civ. P. In this case a Rule 54(b) certification was unnecessary since the district court's judgment was final inasmuch as it disposed of *all* claims against *all* parties (85a). It is precisely for this reason that the district court refused to sustain petitioner's third party complaint against Rockcor, but allowed petitioners to file a post-judgment motion for substitution under Rule 25(c), Fed. Rule Civ. P. A post-judgment motion for equitable relief does not require a certification pursuant to Rule 54(b), Fed. R. Civ. P. in order that a judgment may accrue interest. The primary purpose of Rule 54(b) is to determine finality for purposes of appeal, *Curtiss-Wright Corp.* v. *General Electric Co.*, 446 U.S. 1 (1980); 10 C. Wright & A. Miller, *Federal Practice and Procedure:* Civil 2d §2654; 6 *Moore's Federal Practice* §54.20, 54.27(1)-(2).

unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court', the date of the entry of judgment should ordinarily be the same as the date of rendition of a jury verdict (in the instant case, the date the district court assessed Petitioner's damages)". *Id.* at 756 n.5. In addition, the Ninth Circuit found that Rule 62(b), Fed. R. Civ. P., provides a procedure for a movant (respondents) to secure a stay of execution on the entered judgment if post-verdict motions are to be made. *Id.* In the instant case, respondents did not move the courts below to grant such a petition under Rule 62(b), Fed. R. Civ. P. The decision of the First Circuit herein appealed is directly contrary to the position of the Ninth Circuit.

3. *The Opinion of the Eighth Circuit Court of Appeals.*

Although recognizing that its Circuit had not specifically ruled on the issue, the Eighth Circuit Court of Appeals expressly adopted the Ninth Circuit's analysis in *Turner*, *supra*, and held that a successful litigant is entitled to interest running from the date of entry of judgment on the original jury verdict rather than from the date the district court's grant of judgment n.o.v. was reversed by the appellate court. *See Huck* v. *Burton*, 768 F.2d 285 (8th Cir. 1985). The Eighth Circuit, thus, expressly rejected the Second Circuit's interpretation of 28 U.S.C. §1961, and is now in conflict with the position adopted by the First Circuit in the case at bar.

4. *The Opinion of the Seventh Circuit Court of Appeals.*

In *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, 585 F.2d 821 (7th Cir. 1978), the Seventh Circuit found "that 28 U.S.C. §1961 does not in [its] terms require that a judgment be final in the sense of tying up all the issues in a case". *Id.* at 846. The Seventh Circuit is expressly contrary to the First and Second Circuits' opinions that when post-judgment motions for equitable relief are filed, interest may not properly accrue until those motions are resolved. In fact, the Seventh Circuit Court of Appeals in awarding interest from the entry of judgment without regard to post-judgment motions reasoned:

"Plainly Rule 59 and Rule 50 contemplate that judgment will be entered promptly without regard to whether post-trial motions are in the offing. So does Rule 62(b), which gives the district courts discretion to stay the execution of judgment pending disposition of post-trial motions." *Id.* at 846.

5. *The Opinion of the Fifth Circuit Court of Appeals.*

For its part, The Fifth Circuit Court of Appeals reached still another interpretation: it accepted the *Turner* court's analysis that the purpose of awarding post-judgment interest is to compensate the "wronged person" for the loss of the use of a money judgment, but it refused to establish a uniform rule. Instead, the Fifth Circuit concluded that the date a judgment begins to accrue interest will be determined by "equitable" considerations on a case-to-case basis. *See Affiliated Capital Corp.* v. *City of Houston*, 793 F.2d 706 (5th Cir. 1986).

In *Louisiana and Arkansas Ry. Co.* v. *Pratt*, 142 F.2d 847 (5th Cir. 1944), the Fifth Circuit held that an award of interest from the date of the verdict was within the "equity" of the federal interest statute. Conversely, in *Affiliated Capital, supra*, the Fifth Circuit concluded that the equities in the case dictated that interest run from the date of judgment on appellate remand because the prevailing party was entitled to recover treble damages, *Affiliated Capital*, 793 F.2d at 712. Such "equities" are not present in the case at bar. In fact, the opposite is true. Petitioner has suffered inequity because for more than a decade and a half, since respondents breached the contract, petitioner has been forced to finance respondents' contractual obligation in the highway project and lost the use of its money judgment while respondents had a windfall profit using petitioner's money during an era when interest rates reached record heights. Petitioner was further denied all equity because it had to borrow money at record high interest rates to continue the project, while respondents used petitioner's money interest-free.

The position assumed by the Seventh, Eighth, and Ninth Circuit Courts of Appeals that 28 U.S.C. §1961 does not limit the allowance of interest to judgments from which an appeal lies, seems to be supported by the opinion of this Court in *Briggs* v. *Pennsylvania Ry.*, 334 U.S. 304 (1948), although petitioner admits the matter is unsettled. In *Briggs*, *supra*, this Court suggested that section 1961, Title 28 U.S.C., might even allow interest on a verdict prior to its entry as a judgment under Rule 58, Fed. R. Civ. P., but did not need to determine when interest begins to run in deciding the case before it. *See Hooks*, *supra*, 642 F.2d at 619, n.2 (Judge Mikva's dissent). This would appear to be a good interpretation since allowing interest from the date of entry of a partial judgment on the liability issue would go a long way towards encouraging settlements; parties adjudged liable would have a greater incentive to settle a case or stipulate damages if they knew interest attached from the date of the partial judgment on the liability issue; conversely, a party adjudged liable would be encouraged to file motions intended to delay the proceedings so that it may use the money, *interest-free*, that properly belongs to the opposing party. That is exactly what happened in the instant case. The respondents wilfully breached the contract in 1971. In 1972, the case was docketed; in 1977, judgment on the issue of liability was entered against respondents. In 1982, judgment for damages in excess of $2.4 million was entered against respondents, and in 1987, the Circuit Court of Appeals held respondents would pay interest only from 1986. It is urged that such interpretation will generate more lawsuits, protract litigation and discourage settlements, even after a party is adjudged liable.

B. *Four United States Supreme Court Justices Have Already Expressed the Need for This Court's Authoritative Voice To Settle the Instant Conflict Among the Circuit Courts of Appeals.*

The need for uniformity of decisions among the circuit courts of appeals regarding the date a judgment starts to accrue interest was clearly recognized by four dissenting Supreme Court Justices in *Briggs* v. *Pennsylvania Ry.*, 334 U.S. 304 (1948).

Although at that time only two circuit courts of appeals had conflicting views regarding the computation of interest under a federal statute[8] (compared to the present controversy where seven circuit courts of appeals now have conflicting views), the aforementioned justices dissented from the majority's refusal to decide the issue at that time stating that:

> "[t]he question is of considerable importance for the proper and uniform administration of the statute; it is not entirely without difficulty; and the uncertainty as well as the conflict of decision should be ended. There is no good reason for permitting their indefinite continuance, to the perplexity of the courts and counsel, and to an assured and unpredictable amount of injustice to litigants." *Id.* at 313-14.

Notwithstanding, forty (40) years have passed and as predicted in *Briggs*, confusion, uncertainty, and injustices have occurred. Surely, this court will want to end such situation.

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[8] The dissenters in *Briggs*, *supra*, were then seeking review of 28 U.S.C. §811, which is the predecessor statute of 28 U.S.C. §1961; both statutes have almost identical language. Compare *Briggs*, *supra*, 334 U.S. at 308 n.3, with 28 U.S.C. §1961.

C. *The Advisory Committee on Appellate Rules Has Expressly Recognized in Its Comments the Existence of Confusion and Uncertainty in the Interpretation of 28 U.S.C. § 1961.*

The need for this court's guidance is also evident in the Advisory Committee's Notes Regarding Rules 36 and 37, Fed. R. App. P. In its comments under Rule 36, the Advisory Committee notes that:

> "[a]t present, uncertainty exists as to the meaning of the date of entry of judgment . . ."

In its comments under Rule 37, the Advisory Committee also notes that:

> [t]he first sentence makes it clear that if a money judgment is affirmed in the court of appeals, the interest which attaches to money judgments by force of law (*see* 28 U.S.C. §1961 and §2411) upon their initial entry is payable as if no appeal had been taken, whether or not the mandate makes mention of interest. *There has been some confusion on this point* . . . . (emphasis added).
>
> In reversing or modifying the judgment of the district court, the court of appeals may direct the entry of a money judgment, as, for example, when the court of appeals reverses a judgment notwithstanding the verdict and directs entry of judgment on the verdict. In such a case, the question may arise as to whether interest is to run from the date of entry of the judgment directed by the court of appeals or from the date in which the judgment would have been entered in the district court, except for the erroneous ruling corrected on appeal". (citations omitted)

Thus, even the Advisory Committee makes a plea for an end to the existing confusion and for clarification of the meaning of "entry of judgment" for the purpose of attaching interest under 28 U.S.C. §1961. This Court should end such disarray and give the lower courts and litigants the benefit of its wisdom.

II. The Decision of the Court of Appeals Is in Direct Conflict With *Klaxon Co.* v. *Stentor Co.*

The First Circuit's opinion in the instant case is also in direct conflict with the decision of this Court which held that when a federal court's jurisdiction is based upon diversity, interest is computed according to state law. *See Klaxon Co.* v. *Stentor Co.*, 313 U.S. 487 (1941); *New Amsterdam Casualty Co.* v. *Soileau*, 167 F.2d 767, 772 (5th Cir.), *cert. denied*, 335 U.S. 822 (1948) (applying Louisiana rule on accrual of interest from the date of judicial demand, where the jurisdiction of the court was founded on the diversity of the parties).

Similarly, under Puerto Rico law, where the dispute involves a breach of contract between the parties, interest accrues from the date of the breach. Under the doctrine of *Erie* v. *Tompkins*, 304 U.S. 64 (1938), a federal court sits as a state court in diversity actions and *must* follow state law. In the instant case, the courts below did not follow state law, and this court should use its supervisory powers to compel the lower courts to follow the *Klaxon* decision and award interest from the date of the breach of contract by respondents, as mandated by Puerto Rico law.

III. The Refusal of the Courts Below To Award Petitioner Attorney's Fees and Costs as Expressly Mandated by a Valid Contract Constitutes Judicial Impairment of the Contract Contrary to the Intent of the Constitutions of the United States and the Commonwealth of Puerto Rico.

The relevant provision of the contract between the parties mandates:

> "That if it becomes necessary for either the Contractor (petitioner) or the Subcontractor (respondents) to resort to legal action to compel compliance with the terms of this Agreement, reasonable legal fees shall be paid in addition to any sum which the court may award either party." (A. 4017)

The courts below simply disregarded that provision of the contract and without any reason, denied Petitioner attorney's fees.

Article I, Section 10, of the Constitution of the United States commands in its pertinent part that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ."

Article II, Section 7, of the Constitution of the Commonwealth of Puerto Rico ("Bill of Rights") mandates in its pertinent part that ". . . No laws impairing the obligation of contracts shall be enacted . . . ."

Although both mentioned constitutional provisions seem to be addressed to the law-making body of the State, the same restriction prohibiting the impairment of contracts should apply to all courts since they are called upon to interpret, not create, the law, absent extraordinary circumstances or an express mandate. The State's legislative body does not have the power to impair a contract; neither should a federal court sitting as a state court have the power to annul or strike a perfectly valid contractual clause without any reason whatsoever for its action. To reach a different conclusion would give the courts unlimited power to directly or indirectly discard, without justification, a perfectly valid clause in a contract, *motu propio*, to the detriment of one of the litigants, and to disregard the will of the contracting parties. The validity of the contract has not been contested throughout this fifteen year litigation and the record shows that the circumstances surrounding the subscription of said contract have not changed. This Court should clarify the extent of the power of courts, if any, to judicially impair valid contracts.

One district court judge (Cerezo) reversed the order of another district court judge (Bootle); Judge Bootle awarded costs to petitioner after the first trial, and Judge Cerezo simply reversed that order. The revocation by a federal judge of costs awarded after the first trial by another federal judge of equal standing, and the district court's revocation of a valid contractual clause without any specified reason is so far departed from the accepted and usual course of proceedings, so as to call for an exercise of this Court's power of supervision.

Conclusion

The differing, irreconcilable, and conflicting opinions of seven (7) federal circuit courts of appeals as to the interpretation of 28 U.S.C. §1961 should be authoritatively decided by this Court to bring about uniformity of decisions, *McElroy* v. *United States*, 455 U.S. 642, 643 (1982) (certiorari granted because of "a conflict among the circuits on the issue of statutory construction"); Forty (40) years ago four (4) justices of this Court strongly urged without success that the issue now presented herein be reviewed. (*Briggs, supra*, 334 U.S. 304); and the Advisory Committee on Appellate Rules has emphasized there is confusion and uncertainty in the statutory construction of 28 U.S.C. §1961. (*See* Comments Under Rules 36 and 37, Fed. R. App. P.).

Review is further warranted because the lower courts failed to comply with the decision in *Klaxon Co.* v. *Stentor & Co.*, 313 U.S. 487 (1941) which mandates district courts to follow state law in the computation of interests, and because the lower courts, without any specified reason, have judicially stricken a valid contractual clause and allowed a federal judge to overturn the order awarding costs issued by another federal judge of equal standing; such conduct by the lower courts has so far departed from the accepted and usual proceedings so as to warrant review under this Court's supervisory powers.

Finally, the extent of the power of courts, if any, to judicially impair a valid contract should be examined.

For all of the aforesaid reasons, the petition for writ of certiorari to the United States Court of Appeals for the First Circuit should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1303

EXPLOSIVES CORPORATION OF AMERICA,
et al.,
Plaintiffs, Appellants,

v.

GARLAM ENTERPRISES CORPORATION,
et al.,
Defendants, Appellees.

No. 86-1362

EXPLOSIVES CORPORATION OF AMERICA,
Plaintiffs, Appellees,

v.

GARLAM ENTERPRISES CORPROATION,
Defendant, Appellant.

No. 86-1650

EXPLOSIVES CORPORATION OF AMERICA,
et al.,
Plaintiffs, Appellants,

v.

GARLAM ENTERPRISES CORPORATION,
et al.,
Defendants, Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

[Hon. W.A. Bootle,* Senior U.S. District Judge]

[Hon. Carmen C. Cerezo, U.S. District Judge]

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* Of the Middle District of Georgia, sitting by designation.

BOWNES, Circuit Judge. This appeal stems from a contract between Garlam Enterprises Corporation (Garlam) and Explosives Corporation of America (Explo). On January 3, 1972, Explo sued Garlam for breach of contract. Garlam filed an answer and brought a counter-claim alleging breach of contract by Explo. After two jury-waived trials, one on liability and one on damages, Explo was found liable to Garlam in the amount

of $2,423,177.[1] Explo has appealed the liability finding, the damages award, and the award of post-judgment interest. It also claims that the adjudications made by the Superior Court of Puerto Rico in a suit brought by Garlam against the Puerto Rico Highway Authority were binding on Garlam and the district court and require a reversal of the judgment. Garlam has appealed from a denial of its motion to substitute Rockor, Inc., for Explo as the defendant-appellant in the contract action. Garlam also appeals the district court's refusal to award it attorney's fees, costs and prejudgment interest.

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[1] Judge Bootle heard and decided the liability phase of the case. Judge Cerezo has decided all of the other issues.

I. CONTRACT LIABILITY

A. The Findings and Evidence

The district court made extensive and detailed findings of fact which we have reviewed pursuant to the command of Federal Rule of Civil Procedure 52: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Based on our examination of the trial transcript, depositions and exhibits, we conclude that the district court did not make any clearly erroneous findings of fact. Our summary of the evidence and findings follows.

Garlam was the successful low bidder for the construction of one section of a highway in Puerto Rico running from San

Juan to Ponce. It entered into a contract with the Puerto Rico Highway Authority to do the work for an estimated total price of $13,489,412.39. The contract was advertised and bid as a series of forty-one different work items. Garlam submitted a separate bid price for each. Garlam's total bid was calculated by multiplying each work unit price by the estimated quantities of work to be done and then adding up the amounts for each of the forty-one work items. The estimated quantities of work were supplied by the Highway Authority.

Two work items are of special significance. Item 4, entitled Unclassified Excavations, required, inter alia, the mass blasting of rock wherever found. Garlam's bid was $2.03 per cubic meter on an estimated quantity of 4,680,000 cubic meters of material to be excavated.

Garlam had to excavate the material from the job site and deposit it in designated embankment areas as fill. Item 35 covered presplitting, which is a procedure for limiting the effects of rock blasting to a restricted area. Garlam's bid price for this work was $1.40 per lineal foot on an estimated quantity of 300,000 lineal feet; the total bid price was $420,000.

After a period of negotiations between Raymond Garffer, president of Garlam, John W. Goode, division general manager for Explo, and Hugh E. Oswald, general counsel for Explo, a contract was executed on April 28, 1971. An amendment to the contract executed May 5, 1971, stated that Explo would begin work "on May 12, 1971, for a total of four hundred eighty-nine (489) calendar days and shall terminate said work September 22, 1972."

The contract stated that "time was of the essence."

The contract provided that Explo would perform all the mass blasting necessary under Item 4 of the prime contract between Garlam and the Highway Authority at a unit price of .51 cents per cubic meter of material. Explo also agreed to do the presplitting required under Item 35 of the prime contract at the rate of .70 cents per lineal foot. The unit price clause of the contract contained the following provision: "Blasted rock fragments shall average up to a maximum of 15 inches in size." This language was the result of negotiations between Garffer, Goode and Oswald. The words "up to a maximum" were inserted at the insistence of Garffer; the word "average" came from Goode. Oswald drafted the composite clause. Garffer testified that he

expected that ninety to ninety-five percent of the blasted material would be less than fifteen inches in size. He acknowledged that inevitably some large boulders would be produced, but anticipated that they would be reduced in size by secondary blasting. Garffer also testified that when he first met with Albert Teller and John Goode, who were in charge of Explo's field operations in Puerto Rico, he asked them if they could give him an average product four to six inches in size and they assured him that they could.

Immediately after the contract was executed on April 28, 1971, Garlam instructed Explo to begin blasting. Explo, however, did not start until early in June. After the first few blasting shots, Garlam informed Explo that the rock fragments were too large and con-

trary to the contract specifications. Explo did not challenge Garlam's interpretation of the contract until September 22, 1971, when it stated in a letter to Garlam that the rock-size clause meant "an average maximum" of fifteen inches.

Explo had blasted very little rock of any size by September of 1971 and had received no payments from Garlam for what blasting it had done. Explo retained the law firm of DeGarmo, Liedy [sic], Oles and Morrison of Seattle. They contracted for the services of Arner [sic] W. Erickson, a civil engineer, who had considerable experience in highway construction and blasting operations. Erickson came to Puerto Rico on September 5, 1971, to investigate the

situation. He met with Garffer of Garlam the next day and inspected the job site.

Erickson's testimony included statements to the following effect: He did not attempt to resolve the controversy over the rock size. He saw blasted rocks ranging in size from six and seven feet down to one foot. Garlam had good reasons for wanting rocks less than fifteen inches in size; the blasted material would be easier to handle and move and it was more suitable for use as fill in the embankment. Large boulders could not be used for fill.

Erickson returned to Seattle before September 11. He advised Explo to replace some of its personnel in Puerto Rico and to increase the amount of equipment it was using. Explo replaced the two men in Puerto Rico in charge of its operations, Teller and Goode, with

Messrs. Cronin and Herrera. Cronin and Herrera arrived sometime in late September. Beginning in October, the quantity and quality of the blasting material produced by Explo improved. Garlam had continuously insisted that the rock blasted should not exceed fifteen inches in size, but Explo regularly and consistently exceeded that size.

In the morning of November 3, 1971, Garffer met with Attorney Oles and W.E. Johnson of Explo. Johnson had been hired by Explo to manage all its Puerto Rico jobs[2/] from October of 1971 to March, 1972. Oles informed Garffer that, unless its price for mass blasting was raised to .82 cents per cubic yard and its presplitting increased by some negotiated amount, Explo would be forced to leave

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2/ Explo had two other jobs in Puerto Rico in addition to the one for Garlam.

the project. Garffer told them that he would think it over and give them his decision that afternoon. Garffer told Oles and Johnson in the afternoon of November 3 that he would not renegotiate the contract prices. Oles then informed Garffer orally that Explo terminated the contract. This oral termination was confirmed in a letter dated November 9.

The reason advanced by Explo for its slow progress on the job was that Garlam had no available written work schedule and that Explo, therefore, was unable to properly program its blasting activities. Garlam followed the critical path method in scheduling its work. It provided the Highway Authority with its work schedules, which under the prime contract had to be programmed on a weekly and daily schedule. Copies of the critical path schedules were available to Explo in

Garlam's construction-site office. One of Garlam's supervisors met daily with Explo and advised it of the work schedule. Explo was also advised of the weekly work schedule that Garlam was following.

Under the contract, there were to be partial payments to Explo for its production at the agreed unit price within ten days after Garlam had been paid by the Highway Authority for that particular work. Garlam made no payments to Explo, although it had received payments from the Highway Authority for work done by Explo. Garlam made no payments to Explo for two reasons. First, it felt that payment was not warranted because of the great number of rocks in excess of fifteen inches. In connection with this, there was some discussion of reducing the payments by fifty percent because of the

oversized blasted fragments, but no agreement was reached. The second reason for Garlam's failure to make any payments was that Explo owed it money for the use of Garlam's equipment, personnel, and other services. The amount due Garlam from Explo was greater than any payments due Explo for blasting.

The critical findings of the district court can be stated as follows. Explo "passively" accepted Garlam's interpretation of the rock-size clause in the contract until September 22, 1971. The clause was a composite drafting by both Explo and Garlam with the final language drafted by Attorney Oswald of Explo. "During the six months period that Explo was working on the project, it did not comply with the interpretation of Garlam as to the maximum rock size although Garlam continuously insisted that Explo

produce material not exceeding 15 inches in size."

Despite the contract provisions and Garlam's instructions, Explo unnecessarily delayed starting its work and continued to show slow progress in carrying out the blasting. Explo's slowness was not attributable to Garlam which had the right under the contract "to direct the work of Explo from day to day and coordinate Explo's work with its own and that of other subcontractors."

Explo abandoned the contract on November 3, 1971.

B. Conclusions of Law of the District Court

We turn next to the pertinent conclusions of law of the district court. The conclusions are indented and followed by our comments.

A. The contract is to be interpreted under Puerto Rico law. There is no dispute as to this.

B. Explo was not a third-party beneficiary of the prime contract and "any alleged violations of the prime contract by Garlam would not justify Explo's failure to perform the subcontract or its abandonment of the project."

Explo seems to argue that it had a right of renegotiation because the prime contract provided for equitable renegotiation of unit prices if the actual work quantities differed substantially from the Highway Authority's estimate. There was, however, no such provision in Explo's contract and the district court's ruling was correct. Moreover, there was no evidence before the district court that Explo's production was affected in any way by the work

quantity estimates of the Highway Authority. The difficulties between Explo and Garlam stemmed from three factors: oversize rock fragments, low quantity of material blasted, and slow work progress.

> C. The subcontract between the parties does not have a termination or rescission clause that will permit Explo to rescind or cancel the subcontract with Garlam . . . . If Explo is entitled to terminate the agreement . . . the authorization to do so is to be found not in the subcontract but in some other source.

This is a correct reading of the contract.

> D. It is not necessary to decide whether under Puerto Rico law substantial nonpayment excuses performance because "the evidence fails to establish any substantial non-payment."

This finding of fact is not clearly erroneous.

> F. The language contained in the unit price clause is ambiguous and therefore it is necessary to apply the rules of interpretation contained in the Civil Code of Puerto Rico. Title 31 § 3478 of that code reads as follows:
>
> > The interpretation of obscure stipulations of a contract must not favor the party occasioning the obscurity.

The language of the unit price clause was finally drafted by Mr. Hugo E. Oswald, Jr., then general counsel for Explo, in the negotiations of the subcontract. While both Garlam and Explo contributed some of the complicating words, the final drafting was actually done by Mr. Oswald. We conclude as a matter of law that the obscurity of the language must be charged to Explo and that the correct interpretation of the unit price clause is that the material to be produced must be generally within the range of 15 inches or less. We conclude that otherwise Garlam could not comply with other requirements of the prime contract which required it to dispose of the

> rock fragments to construct compaction layers of approximately 6 inches in the embankments and 24 inches in the rock fills. The interpretation of the clause suggested by Explo creates an absurd situation which this court rejects. Its suggested interpretation is inconsistent with its explicit contractual obligation to blast "secondary boulders that may appear after a blasting operation, if required by the contractor." Therefore, in the determination of the amount of work done by Explo, consideration should be given to the contractual requirement that Explo produce material which finally could not exceed 15 inches as a maximum size and that such other larger boulders had to be broken down by secondary blasting if they exceeded this maximum of 15 inches.

Explo objects strenuously to this mixed finding of law and fact. Whether the "obscurity" of the language should be charged to Explo is a close question, but we think that Oswald, as a lawyer, should have been aware that the rock-size clause was ambiguous and thus we agree with the

district court that the responsibility for its language lay with him. Even, however, if we accept the clause as a joint production, the evidence establishes that Explo knew and understood that rocks in excess of fifteen inches were to be the exception rather than the rule from the time the contract was being negotiated to its dissolution by Explo on November 3, 1971. Explo's field managers, Teller and Goode, told Garffer during contract negotiations that Explo could produce rocks averaging four to six inches in size. Explo did not urge its version of the meaning of the clause until September 22, 1971. And, after the new personnel arrived on the job in October, the size of the rock fragments diminished appreciably. We interpret the contract provision as did the district court.

> G. As a consequence of this breach by Explo, Explo is obligated to pay to Garlam the actual and necessary additional costs reasonably incurred by Garlam in order to complete the work required by Explo by the subcontract. As above indicated, the question whether or not any delay penalty is chargeable against Explo and if so, how much, is to be determined by evidence adduced in the second trial. The question of interest on any amounts credited to or chargeable against Explo is likewise to be determined by evidence adduced at the second trial. All costs of this first trial are taxed against Explo.

This ruling follows logically from the previous ones.

II. DAMAGES

By stipulation of the parties, the damages issue was referred to a master. The master held a two-day hearing at which a great number of exhibits of considerable size and complexity were introduced. His detailed and extensive

report was issued about six months after the hearing.3/ The master awarded damages to Garlam in the amount of $2,423,177. The findings and rulings of the master were subsequently adopted by the district court.

We agree with the district court that the master applied the correct legal principles in making his findings, which were supported by the evidence and not clearly erroneous. We rule specifically that Garlam carried its burden of proof on damages. There is no basis in the contract or the evidence for finding that Explo was entitled to an equitable price increase. Nor are we impressed with Explo's argument that Garlam failed to

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3/ The master actually rendered two reports: a preliminary draft dated March 19, 1980, submitted to the parties for their comments and recommendations; and a final report dated April 24 and filed on April 29, 1980.

mitigate its damages and, hence, is precluded from recovering. This overlooks the fact that, after Explo breached its contract, Garlam was under time constraints in its prime contract with the Highway Authority to complete the blasting within a comparatively short time.4/ The measure of damages was, as the district court found, "the actual and necessary additional costs reasonably incurred by Garlam in order to complete the work required by Explo by the subcontract." The amount arrived at by the master reflected accurately the application of this damages formula.

4/ Explo had agreed to do the work by September 22, 1972.

III. THE SUIT IN PUERTO RICO SUPERIOR COURT BY GARLAM AGAINST THE HIGHWAY AUTHORITY

We now turn to Explo's claim that the adjudications in Garlam's Puerto Rico Superior Court suit against the Highway Authority were binding on Garlam and the district court and require a reversal of the judgment against Explo.

Initially we note that we can find nothing in the record to indicate whether the Superior Court judgment, which is dated June 15, 1982, has been appealed. Nor have we found any definitive record of when the Superior Court action was commenced. We will, however, for purposes of our analysis accept Explo's representation that the suit was filed prior to the start of the hearing on damages before the master.

We agree with Explo that a judgment of the Commonwealth court is entitled to full faith and credit by a federal court. We also agree that the collateral estoppel doctrine of issue preclusion would prevent a party from denying or relitigating in federal court issues already decided by the Superior Court of Puerto Rico. The question is whether, under the circumstances here, the rulings and findings of the Superior Court in the case of Garlam v. The Highway Authority require a reversal of the judgment in this case. We find that they do not for several reasons.

The first is a matter of chronology. The Superior Court judgment did not issue until June 6, 1982. It, therefore, post-dated the liability verdict of March 30, 1977, in this case by more than five years. It also postdated the master's

report of April 29, 1980, by more than two years. And, although the Superior Court judgment did precede the opinion and judgment of the district court of November 16, 1982, adopting the master's findings and rulings, the Superior Court judgment was not called to the district court's attention until November 24, 1982.

Under this chronology, we rule that the Superior Court judgment could have no effect on the liability rulings and findings made in this case. We agree with the district court that Explo's tardy invocation of the Superior Court judgment precludes it from using the judgment for an attack on the damages awarded Garlam. Explo knew about the Superior Court action from at least the date of the hearing before the master on damages, October 29-31, 1979. It questioned and

cross-examined Highway Authority witnesses about the Commonwealth court action, referred to the pleadings, and introduced in evidence part of the proceedings in the Superior Court. It is fair to assume that Explo followed the progress of the Superior Court action closely. We think it was inexcusable for Explo to wait until after the district court's opinion and judgment on damages before raising the issue of the effect of the Superior Court case on this litigation. The doctrine of laches applies to such conduct.

We are also troubled by Explo's failure to at least attempt to intervene in the Superior Court action. The comments of the district court are pertinent:

> Explo has not explained either why it never sought intervention in the Commonwealth case or why it did not request joinder of the

claim against Garlam for the equitable unit price reduction it could have allegedly derived from Garlam's contract with the PRHA. The record shows that the Superior Court case was known and monitored by Explo throughout the years. Explo continuously referred to the pleadings filed in that case and even submitted part of the Superior Court's record as evidence for the Special Master to consider in his determination of damages. Explo's argument that it was not necessary for it to intervene in the Superior Court action because that case dealt with other matters is self-defeating. The Puerto Rico Rules of Civil Procedure allowed Explo to appear in that action to plead precisely the third-party beneficiary status theory that it has now attempted to introduce in this case. Likewise, it could have joined as a party in the two actions. Instead, it adopted a wait and see attitude and never formally raised this new theory of equitable price reduction in this litigation or in the one before the Superior Court.

In addition to the procedural barriers to Explo's attempt to use the Superior Court case to avoid the judgment

against it, there are also substantive grounds precluding the application of the doctrine of issue preclusion. We note first that the findings and rulings of the Superior Court do not discuss blasting or Explo's role in the highway construction. The Superior Court found that the Highway Authority owed Garlam $2,466,316.73 based upon the following specific findings:

a)	Deposit of 385,803.71 cubic meters of borrowed material agreed upon at $2.95 per cubic meter (Finding of Fact No. 3)	$1,138,120.94
b)	Difference owed on over-cuts and miscellaneous cuts -328,008.20 cubic meters at $.92- (Finding of Fact No. 4)	294,407.54
c)	Asphalt provided - 553.645 tons at $25.88 (Fact No. 5)	46,305.57
d)	Compacted material - 2,196,093.62 cubic meters at $.30, less $7,274.43 granted by summary judg-	

	ment of March 12/78 (Fact No. 6)	651,553.66
e)	Excavation of material for benchings 137,794.92 cubic meters at $2.03 - (Fact No. 7)	279,722.67
f)	Commercial profit and administrative expenses on work performed through force account (Fact No. 8)	56,206.35
	Total to be paid	$2,466,316.73

Explo's argument can best be stated in its own words:

> In Superior Court, Garlam blamed the owner for cost overruns and collected millions of dollars based (in part) on faulty design. Meanwhile, in federal court, Garlam charged Explo for the entire cost overrun on rock blasting and denied that design errors existed. Garlam refused to credit Explo with the same kind of equitable price adjustment which Garlam obtained for part of its own work from the owner. In short, Garlam wants Explo to reimburse costs which the Superior Court has attributed to the Highway Authority.

Explo's Brief for Nos. 1303 and 1650 at 46. This is a misreading of both the Superior Court decision and the master's findings and rulings on damages. The Superior Court based its decision on the prime contract between the Highway Authority and Garlam in light of subsequent events that related to those two parties alone: the Highway Authority's issuing of thirty extra work orders and nine change orders; its failure to pay Garlam the agreed price for excavating, moving, and depositing of borrowed material; and its failure to pay Garlam anything for certain work items performed. The basis of the master's decision on damages was the extra cost incurred by Garlam due to Explo's breach of its blasting contract. These were two separate lawsuits and the issues in both were different. In short, there can be

no issue preclusion because there is no identity of issues in the two cases.

In this connection, we point out that if Garlam were recovering twice for the same items of work, it would have been to the Highway Authority's advantage to invoke the doctrine of collateral estoppel as to those items for which Garlam was seeking recovery against both Explo in federal court and the Highway Authority in the Superior Court. The Highway Authority was fully aware of the suit by Explo and Garlam's counterclaim. The Authority's resident engineer testified at the federal trial on liability and the general counsel for the Department of Public Works testified at the federal trial on damages and introduced excerpts from the Superior Court trial. Although the Highway Authority

might possibly have overlooked some double pay items, it does not seem likely.

For all the foregoing reasons, we rule that the doctrine of collateral estoppel cannot be invoked in this case and that the rulings and findings of the Superior Court case have no effect on the judgment rendered in the case before us.

IV. INTEREST COMPUTATION

On May 19, 1986, the district court ordered that interest on damages be computed pursuant to 28 U.S.C. § 1961 from November 16, 1982, the date of the court's judgment awarding damages to Garlam. Explo appeals the date of interest accrual, arguing that interest should only be awarded from March 6, 1986, the date of the district court's judgment after which these appeals were filed.

A. Procedural History

The case was brought in the United States District Court on January 3, 1972. On November 28, 1979, Garlam appealed from the dismissal of its third-party complaint against Rockor. On December 10, 1979, this court stated: "Since it does not appear on the papers before us that the district court certified this dismissal as final pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, we lack jurisdiction over this appeal." On November 16, 1982, the district court entered a judgment against Explo on its complaint and for Garlam on its counterclaim. On March 15, 1983, Explo filed a notice of appeal. On May 9, 1983, this court dismissed the appeal holding: "It appearing that the notice of appeal was filed while a motion to substitute parties was pending, we

view the judgment below as not a final judgment." On August 16, 1985, Garlam filed a notice of appeal from the judgment of November 16, 1982,[5] and the district court's order of August 8, 1975, denying Garlam's motion to substitute Rockor for Explo. On August 26, 1985, the district court granted Explo's motion to have the proceedings continue in that court because Explo had a pending motion for postjudgment relief. On October 10, 1985, this court dismissed Garlam's appeal. The memorandum and order reads:

> In 1983, Garlam Enterprises Corporation ("Garlam") argued to this court that an order entered by the district court in November, 1982, was not a final order because it did not adjudicate all of the claims against all of the parties. This court agreed, noted that

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5/ Garlam appealed from the denial of prejudgment interest, costs and attorney's fees, and the order to pay one-half of the master's fees.

against all of the parties. This court agreed, noted that proceedings were still pending in the district courts [sic], and dismissed without prejudice an appeal filed by Explosives Corporation of America ("Explo").

Now, Garlam argues to this court that the November 1982 order was a final judgment, and that a Motion for Reconsideration filed recently by Explo is therefore untimely. This court's prior order, however, reflects the law of the case and is binding precedent upon Garlam at this stage of the litigation. United States v. DeJesus, 752 F.2d 640, 642 (1st Cir. 1985) (per curiam).

Alternatively, Garlam requests that this court take jurisdiction over this appeal even though a motion for post-judgment relief is pending in the district court. We decline to do so for two reasons. First, it appears that no final judgment has been entered in this matter. Adjudication of Garlam's motion for substitution of parties in and of itself does not constitute entry of a final judgment. See Fed.R.Civ.P. 58.1/ Second, the instant notice of appeal is, in any event, premature because of Explo's pending motion for

> post-judgment relief. That motion tolls the running of the appeal period. F.R.A.P. 4(a)(4). The district court explained this to Garlam, and informed Garlam that it should file a new notice of appeal after that court ruled on Explo's motion.
>
> The appeal is dismissed for lack of jurisdiction, without prejudice to timely filing of new notices of appeal. [Emphasis added.]

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1. We draw this to the attention of the parties and the district court so that this matter can be clarified or corrected without causing the parties further unnecessary delay.

On March 6, 1986, the district court entered an order that was "[f]or purposes of an appeal . . . a Final Judgment." On March 24, 1986, Explo filed a notice of appeal, and on March 31, 1986, Garlam followed suit. It is from these notices that the current appeals stem.

On May 19, 1986, the district court decided that interest should run from the date of its judgment issued November 16, 1982. It based its ruling on the fact that using the date of its March 6, 1986, judgment would "deprive Garlam of its statutory right to obtain interest on the November 16, 1982, judgment [and] would defeat the purposes of [28 U.S.C.] section 1961." The court stated that it had followed the requirements of Rules 58 and 79(a) of the Federal Rules of Civil Procedure for making its November 16, 1982, judgment final with respect to interest accruing, even if the same judgment was not "final" for the purposes of appeal.

B. The Date for Accruing Interest

"Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such inter-

est shall be calculated from the date of the entry of the judgment." 28 U.S.C. § 1961 (Supp. 1987) (emphasis added).

A judgment "includes a decree and any order from which an appeal lies." Fed. R. Civ. P. 54(a). It is clear from this court's prior dismissals that the November 1982 judgment was not final because other issues remained to be resolved.

The district court never made a Rule 54(b)[6] determination as to the November

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6/ Federal Rule of Civil Procedure 54(b) provides:

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay

(See next page.)

1982, judgment nor did Garlam ask for one. Moreover, the district court's order of August 8, 1985--allowing the proceedings to continue in that court despite a pending notice of appeal--suggests that the judgment of November 16, 1982, was not intended to be final.

There is merit to the district court's opinion on interest and there is precedent for awarding interest from the date of judgment on liability and damages. See Turner v. Japan Lines, Ltd.,

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(Continued from previous page.)

and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

702 F.2d 752 (9th Cir. 1983), which held that interest should be computed from the initial assessment of damages where there was a delay between that date and the date of entry of final judgment. Turner expressly rejected the holding in Hooks v. Washington Sheraton Corp., 642 F.2d 614, 616 (D.C. Cir. 1980), which confined the application of 28 U.S.C. § 1961 to a final judgment as defined in Rule 54(b). For several reasons, we believe it would be inappropriate to allow postjudgment interest to begin running before entry of final judgment in this case.

First, Garlam never sought a Rule 54(b) determination even though it had been alerted to the problem by our order of December 10, 1979. Second, Garlam argued that the November 16, 1982, judgment was not final when Explo attempted to appeal the liability part of the judg-

ment. If the judgment was not final for liability purposes, it could not be final on damages. Third, we dismissed appeals on December 10, 1979, May 9, 1983, and October 10, 1985, on the same grounds: that there was no final judgment from which an appeal could be taken. We do not deem it advisable at this stage of the proceedings to decide that final judgment meant one thing for appeal and another for the computation of interest. It is, of course, not without significance that the district court failed to make a Rule 54(b) determination as to its judgment of November 16, 1982.

For the foregoing reasons, interest pursuant to 28 U.S.C. § 1961 must be recomputed starting March 6, 1986.

V. THE SUBSTITUTION ISSUE

Garlam appeals the denial of its motion to amend the pleadings so as to add Rockor, Inc. (Rockor), as a defendant to its counterclaim and the denial of its motion to substitute Rockor for Explo. Since we conclude that substitution should have been allowed, we focus on that.

Federal Rule of Civil Procedure 25(c) provides in pertinent part:

> (c) Transfer of Interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party.

The basic question is whether Rockor should be held liable for the damages awarded Garlam against Explo. Despite the fact that Explo's interest in the

lawsuit was transferred to Rockor, the district court decided against substitution on the ground that liability should not be imposed on Rockor for the debts of its predecessor. We recognize that a substitution decision is within the discretion of the district court but find that its legal analysis was erroneous.

The resolution of this issue turns on the relationship between Rockor, Explo, and Excoa, a corporation with which Explo merged, and Rockor's role in the litigation. The record on this issue consists of stipulated exhibits and the deposition of George S. Sutherland, chairman of the board of Rockor. There is no dispute over the facts, only the conclusions to be drawn from them. In 1959, Rocket

Research Corporation (Rockor)[7] was incorporated in the State of Washington for the research, development, and manufacture of rocket engines and propellants. Sutherland started working for Rockor in 1960 and became its chief executive officer. In May 1966, Explosives Corporation of America (Explo) was incorporated to research, develop, and manufacture explosives. Rockor was Explo's sole stockholder; it owed [sic] 92% of the stock. Sutherland became chairman of the board of Explo. One of Explo's requirements under its contract with Garlam was that it obtain a surety and performance bond in the amount of 1.2 million dollars. The bond was obtained from the General Insurance Company of

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[7] On March 15, 1977, Rocket Research Corporation changed its name to Rockor, Inc.

America after Rockor agreed to indemnify the bonding company if Explo failed to perform. Rockor had full knowledge of the lawsuit since it started; it filed yearly status reports on the litigation with the S.E.C.

In early 1973, Excoa, Inc., was incorporated for manufacturing explosives and chemicals. Rockor was the sole stockholder and owner of Excoa and Sutherland was chairman of Excoa's board of directors from its formation until its dissolution. Explo was merged into Excoa on April 27, 1973, with Excoa assuming all of Explo's debts and liabilities. One of the purposes of the merger was to increase Rockor's ownership of Explo's stock from 92% to 100%. On October 29, 1976, Rockor, as the principal creditor of Excoa, took over most of Excoa's assets; Excoa owed Rockor approximately

$5,600,000. The bill of sale from Excoa to Rockor included all of Excoa's interest in the lawsuit between Explo and Garlam. There was no limitation on the extent of Rockor's participation in the lawsuit. Excoa was subsequently dissolved for tax purposes and not for any reason connected with the litigation. Attorney Oles has represented Explo, Excoa, Rockor, and the General Insurance Company (bonding company) since the start of the lawsuit. Since at least 1976, Rockor has financed the litigation directly.

It can be fairly inferred from the foregoing facts that Rockor has controlled the litigation at least since it took over Excoa's assets on October 29, 1976.

The pertinent procedural history of the substitution issue must also be

recounted. On September 9, 1977, after the liability judgment but before the hearing and award in damages, Garlam moved to substitute Rockor for Explo. This motion was never ruled on directly. Apparently at the suggestion of the court, Garlam filed a motion on November 10, 1977, asking that Rockor be added as a defendant to the counterclaim. On November 6, 1982, former Chief Judge Pesquera reversed a prior ruling he had made and denied the motion for lack of in personam jurisdiction over Rockor. Judge Perez reaffirmed the jurisdictional dismissal of Rockor as an additional party but stated that she would consider a motion for substitution under Federal Rule of Civil Procedure 25(c). Such a motion was filed by Garlam on December 15, 1982. On August 7, 1985,

the district court denied the motion to substitute Rockor for Explo.

The district court's opinion focuses on the fact that Rockor was a separate entity from Explo-Excoa and that Rockor did not assume Explo-Excoa's liabilities. The cases on which it relied involved the question of whether a successor corporation could be sued in the first instance and held liable for the acts or failure to act of its predecessor. With due respect, we think that the court's focus was misdirected; it should have been on the relationship between Rockor and Explo-Excoa and the role Rockor played in the litigation.

In Montana v. United States, 440 U.S. 147 (1979), the Court discussed the effect of the related doctrines of collateral estoppel and res judicata on a nonparty who controls the litigation. It

held that the interests advanced by these doctrines "are similarly implicated when nonparties assume control over litigation in which they have a direct financial or proprietary interest and then seek to redetermine issues previously resolved." Id. at 154. The Court then quoted Souffront v. Compagnie des Sucries, 217 U.S. 475, 486-87 (1910):

> "[One who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own . . . is as much bound . . . as he would be if he had been a party to the record."

We recently applied this principle to hold the two shareholders of a corporation, who were officers and members of the board of directors, liable for unpaid contributions of the corporation to an employee benefits plan. Alman v. Danin, 801 F.2d 1 (1st Cir. 1986). We stressed

that the individuals "held ultimate and complete control over the litigation strategy the now defunct corporation pursued" and that "both men had an economic stake in the outcome of the trial and were, of course, in a position to know everything that occurred." Id. at 5. Rockor was in essentially the same position vis-a-vis Explo-Excoa as were the two shareholders in Alman and, like them, had complete control over the litigation. We realize that in Alman the action was brought directly against the individuals and the question of substitution under Rule 25(c) was not involved.

The underlying legal principle that a participating nonparty is bound by the judgment does not, however, depend upon the procedural stance of the case. In Panther Pumps & Equipment Co., Inc. v. Hydrocraft, Inc., 566 F.2d 8 (7th Cir.

1977), cert. denied sub nom. Beck v. Morrison Pump Co., Inc., 435 U.S. 1013 (1978), the Court held that Rule 25(c) could be invoked to substitute a successor in interest who had obtained the assets of the corporation against whom judgment had been rendered. It defined successor as "one who succeeds or takes the place of another." Id. at 24. It quoted Moore's Federal Practice:

> Rule 25 has application only to actions pending in the district courts. But this should not preclude substitution after judgment has been rendered in the district court * * * for the purpose of subsequent proceedings to enforce * * * a judgment. [3B Moore's Federal Practice ¶ 25.03[1], at 25-101 (2d ed. 1977), footnote omitted]

Id. at 23. The facts in Minnesota Mining and Manufacturing Company v. Eco Chem, Inc., 757 F.2d 1256 (Fed. Cir. 1985), have some similarity to the facts in the instant case. Suit was brought by 3M

against Eco Chem, Inc., a corporation owned and controlled by Stephanie and George Rynne. A default judgment was obtained against Eco Chem. After suit had been commenced, the Rynnes formed a Georgia corporation, ECL, and the shareholders of Eco Chem exchanged their stock for ECL shares and all of Eco Chem's assets were transferred to ECL, making Eco Chem completely judgment proof. The court found that ECL was properly joined as a party "because it succeeded to the assets from which 3M may satisfy its judgment." Id. at 1264.

It has long been the rule that a nonparty who controls the litigation is bound by the judgment. "The reason would be that the non-party would have the power to determine what evidence and arguments should be offered in the litigation and, if appropriate, the appeal."

General Foods Corporation v. Massachusetts Department of Public Health, 648 F.2d 784, 789 (1st Cir. 1981). See also Drier v. Tarpon Oil Company, 522 F.2d 199 (5th Cir. 1975) (president of corporation held liable because of privity and as a controlling person under 15 U.S.C. § 77o [sic]); Kreager v. General Electric Company, 497 F.2d 468, 471 (2d Cir. [sic]) (sole shareholder of corporation bound by dismissal of first action brought in the name of his corporation), cert. denied, 419 U.S. 861 (1974); Pan American Match, Inc. v. Sears, Roebuck & Co., 454 F.2d 871, 874 (1st Cir. [sic]) (subsidiary corporation sufficiently identified with its parent company to represent the legal rights of the parent), cert. denied, 409 U.S. 892 (1972); 1B J. Moore, J. Lucas, & T. Currier, Moore's Federal Practice and

Procedure § 0.411[10] at 477-78 (1984 & Supp. 1986-87).

We agree with the district court that there is no problem of in personam jurisdiction. There are two reasons. First, once in personam jurisdiction has been found over the original party, it exists over the substituted party despite its lack of contacts with the forum if the substituted party had an opportunity to challenge its joinder or substitution. Minnesota Min. & Mfg. Co. v. Eco Chem, Inc., 757 F.2d at 1262-63. See 7C C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1958 at 559-60 (2d ed. 1986). Here, Rockor controlled Explo's successful challenge to the substitution motion.

The second reason is that the minimum contacts necessary for in personam jurisdiction were intertwined with Rockor's

role in the litigation. "In judging minimum contacts, a court properly focuses on 'the relationship among the defendant, the forum, and the litigation.' Shaffer v. Heitner, 433 U.S. 186, 204 (1977)." Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 775 (1984). When substitution was first sought, Rockor had succeeded to Explo-Excoa's interest in the suit, was financing the litigation and had agreed to indemnify the bonding company in the event of a judgment against Explo. Because it availed itself of Puerto Rico as the forum in the hope of obtaining a judgment that would inure to its benefit and was obviously aware of the nature and progress of the case, Rockor had sufficient contacts with Puerto Rico to meet the fourteenth amendment due process

requirements. Keeton v. Hustler Magazine, Inc., 465 U.S. at 775-76.

There can be little doubt that, at least from the time it acquired Explo-Excoa's interest in the lawsuit, Rockor was the real party in interest. Federal Rule of Civil Procedure 17(a) requires that "[e]very action shall be prosecuted in the name of the real party in interest." Rule 25(c) is, in effect, the continuation of Rule 17.

> Subdivision (c) of Rule 25 deals with transfers of interest during the course of the action. The situation with which it is concerned may be compared and contrasted to that obtaining where a transfer of interest such as by an assignment takes place prior to the commencement of the action. In the latter situation Rule 17 controls and requires that the action shall be prosecuted in the name of the real party. But where the transfer of interest takes place during the course of the action, Rule 25(c) controls and provides that the action may be continued by or against the original party

> whose interest has been transferred, unless the court, upon motion, directs that the person to whom the interest has been transferred be substituted in the action, or joined with the original party.

3B J. Moore, & J. Kennedy, Moore's Federal Practice § 25.08 at 25-77, 78 (1987) (footnotes omitted). Substitution may be ordered after judgment has been rendered in the district court for the purpose of subsequent proceedings to enforce judgment. Id. § 25.03 at 25-27.

In addition to Rockor's ownership of Explo-Excoa and its financing and control of the litigation, there is another reason why Rockor is liable for the amount of the judgment against Explo. The contract between Explo and Garlam contained the following clause: "It is mutually agreed that this Agreement shall bind the heirs, executors, administrators, successors, holding companies and assigns of

the parties hereto." It cannot be doubted that Rockor was a successor to Explo. It also is evident that Rockor, which owned all of the outstanding stock of Explo at the commencement of the action, was a holding company of Explo at the time the contract was executed.

For the following reasons, we hold that Rockor is liable for the full amount of the judgment against Explo and must be substituted for Explo as the defendant to Garlam's counterclaim: Rockor from the beginning was the controlling stockholder of Explo-Excoa; it succeeded to Explo-Excoa's interest in the lawsuit; after the merger of Explo into Excoa and Excoa's dissolution, Rockor became the real party in interest, indeed the only party in interest; Rockor financed and controlled the litigation; and Rockor is bound under the contract between Explo

and Garlam as Explo's successor and a holding company of Explo.

Under these facts and the applicable legal principles, Rockor could not limit its litigation liability to the amount for which it agreed to indemnify the bonding company. Litigation is a two-way street. Once it is entered it must be travelled the full length; except for settlement or bankruptcy, there is no escape route. If Garlam had been found liable, the full amount of the judgment would have gone directly to Rockor. It, therefore, must pay the full amount of the judgment against Explo.

VI. GARLAM'S APPEAL ON ATTORNEY'S FEES, COSTS, AND PREJUDGMENT INTEREST

In its opinion adopting the master's report on damages, the district court found "that Explo has not conducted the

litigation in an obstinate manner and that imposition of pre-judgment interest, costs and attorney's fees is not justified." This decision was within the discretion of the district court and we find no reason for disturbing it.

SUMMARY

We affirm the judgment of the district court on liability and damages. We reverse the order of the district court as to the date from which interest shall be computed. We reverse the order of the district court on the motion for substitution and order that Rockor be substituted for Explo as defendant to the counterclaim. We affirm the order of the district court denying Garlam attorney's fees, costs, and prejudgment interest.

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Affirmed in part, reversed in part, remanded.

Costs awarded to Garlam on these appeals.

72397

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1303

EXPLOSIVES CORPORATION OF AMERICA,
et al.,
Plaintiffs, Appellants,

v.

GARLAM ENTERPRISES CORPORATION,
et al.,
Defendants, Appellees.

No. 86-1362

EXPLOSIVES CORPORATION OF AMERICA,
Plaintiffs, Appellees,

v.

GARLAM ENTERPRISES CORPROATION,
Defendant, Appellant.

No. 86-1650

EXPLOSIVES CORPORATION OF AMERICA,
et al.,
Plaintiffs, Appellants,

v.

GARLAM ENTERPRISES CORPORATION,
et al.,
Defendants, Appellees.

JUDGMENT

Entered: April 30, 1987

These causes came on to be heard on appeals from the United States District Court for the District of Puerto Rico, and were argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court on liability and damages is affirmed. The order of the district court as to the date from which interest shall be computed is reversed and the cause is remanded to the district court for redetermination of the interest in accordance with this opinion filed this day. The order of the district court on the motion for substitution is reversed and the cause is remanded to the district court with instruction that Rockor be

substituted for Explo as defendant to the counterclaim. The order of the district court denying Garlam attorney's fees, costs and prejudgment interest is affirmed.

Costs awarded to Garlam on these appeals.

By the Court:

Francis P. Scigliano
Clerk

[cc: Messrs. Oles and Cordero]

72395

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1303

EXPLOSIVES CORPORATION OF AMERICA,
et al.,
Plaintiffs, Appellants,

v.

GARLAM ENTERPRISES CORPORATION,
et al.,
Defendants, Appellees.

No. 86-1362

EXPLOSIVES CORPORATION OF AMERICA,
Plaintiffs, Appellees,

v.

GARLAM ENTERPRISES CORPROATION,
Defendant, Appellant.

No. 86-1650

EXPLOSIVES CORPORATION OF AMERICA,
et al.,
Plaintiffs, Appellants,

v.

GARLAM ENTERPRISES CORPORATION,
et al.,
Defendants, Appellees.

Before

CAMPBELL, Chief Judge,
Coffin, Bownes, Breyer,
Torruella, and Selya,
Circuit Judges

ORDER OF COURT

Entered: June 3, 1987

The panel of judges that rendered the decision in these cases having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court,

Francis P. Scigliano
Clerk

[cc: Messrs. Oles and Cordero]

72396

Mandate

United States Court of Appeals
For the First Circuit

No. 85-1673

EXPLOSIVES CORPORATION OF AMERICA,
PLAINTIFF, APPELLEE,

v.

GARLAM ENTERPRISES CORPORATION AND FEDERAL INSURANCE COMPANY,
DEFENDANTS, APPELLANTS.

Before
BOWNES, BREYER AND TORRUELLA,
Circuit Judges.

MEMORANDUM AND ORDER
ENTERED OCTOBER 10, 1985

In 1983, Garlam Enterprises Corporation ("Garlam") argued to this court that an order entered by the district court in November, 1982, was not a final order because it did not adjudicate all of the claims against all of the parties. This court agreed, noted that proceedings were still pending in the district courts, and dismissed without prejudice an appeal filed by the Explosives Corporation of America ("Explo").

Now, Garlam argues to this court that the November 1982 order was a final judgment, and that a Motion for Reconsideration filed recently by Explo is therefore untimely. The court's prior order, however, reflects the law of the case and is binding precedent upon Garlam at this stage of the litigation. *United States* v. *DeJesus*, 752 F.2d 640, 642 (1st Cir. 1985) (*per curiam*).

Alternatively, Garlam requests that this court take jurisdiction over this appeal even though a motion for post-judgment relief is pending in the district court. We decline to do so for two reasons: First, it appears that no final judgment has been entered in this matter. Adjudication of Garlam's motion for substitution of parties in and of itself does not constitute entry of final judgment. *See* Fed. R. Civ. P. 58.[1] Second, the instant notice of appeal is, in any event, premature because of Explo's pending motion for post-judgment relief. That motion tolls the running of the appeal period. F.R.A.P. 4(a)(4). The district court explained this to Garlam, and informed Garlam that it should file a new notice of appeal after that court ruled on Explo's motion.

The appeal is dismissed for lack of jurisdiction, without prejudice to timely filing of new notices of appeal.

By the Court:
FRANCIS P. SCIGLIANO, Clerk.

Certified and issued as
informal mandate under
F.R.A.P. 41 on Nov. 1, 1981
(s) ILLEGIBLE, Clerk.

s/c: Illegible
Illegible

11-6

Staff Atty.
Appeals' Clerk

11-5-85

[1] We draw this to the attention of the parties and the district court so that this matter can be clarified or corrected without causing the parties further unnecessary delay.

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Nov 5 10:06 AM '85
CLERK'S OFFICE
U.S. DISTRICT COURT
SAN JUAN, P.R.

[cc: Messrs. Cordero, Oles and Antonetti]

Mandate

United States Court of Appeals
For the First Circuit

No. 83-1218.

EXPLOSIVES CORPORATION OF AMERICA,
PLAINTIFF, APPELLANT,

v.

GARLAM ENTERPRISES CORPORATION, ET AL.,
DEFENDANTS & THIRD-PARTY, PLAINTIFFS, APPELLEES.

v.

GENERAL INSURANCE COMPANY
OF NORTH AMERICA,
THIRD PARTY CO-DEFENDANT, APPELLEE.

ORDER OF COURT
ENTERED MAY 9, 1983

It appearing that the notice of appeal was filed while a motion to substitute parties was pending, we view the judgment below as not a final judgment. The appeal is therefore dismissed without prejudice to the filing of a timely appeal after the motion to substitute has been decided.

By the Court:
FRANCIS P. SCIGLIANO, Clerk

Certified and issued as
informal mandate under
F.R.A.P. 41 on Jun. 1, 1983
(s) ILLEGIBLE, Clerk.

RECEIVED & FILED
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CLERK'S OFFICE
U.S. DISTRICT COURT
SAN JUAN, P.R.

s/c: Illegible
Illegible
Staff Atty.
Appeals' Clerk
6-10-83
JK

[cc: Messrs. Antonetti, Oles, Oles & Cordero]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

No. 72-0001CC

EXPLOSIVES CORPORATION OF AMERICA,
PLAINTIFF,

v.

GARLAM ENTERPRISES CORPORATION AND,
FEDERAL INSURANCE COMPANY,
DEFENDANTS & THIRD-PARTY PLAINTIFFS,

v.

GENERAL INSURANCE COMPANY
OF NORTH AMERICA,
THIRD-PARTY DEFENDANT.

ORDER
MAY 23, 1986

On April 14, 1986, third-party defendant General Insurance Company of North America (G.I.C.N.A.) filed a Motion for Supersedeas requesting that the Court stay enforcement of a judgment against it which is currently on appeal and to fix and approve a supersedeas bond attached in the sum of $1,300,000. On April 16, 1986, defendant and third-party plaintiff Garlam Enterprises Corporation (Garlam) filed a Motion for Execution of Judgment based on the fact that on November 16, 1982 judgment for $2,423,177.00 was entered against Explosives Corporation of America and its surety G.I.C.N.A. and that the liability of G.I.C.N.A. was fixed at $1,230,000.00. Garlam states that according to the applicable rate of interest at that time (9.29%) it is entitled to recover from G.I.C.N.A. the $1,230,000.00 awarded plus $450,213.00 in interests from November 16, 1982 up to May 15, 1986. G.I.C.N.A. replied that the November 16, 1982 judgment is not final, as indicated by the Court of Appeals in two orders dismissing prior appeals, and that its supersedeas bond includes

an additional $70,000.00 for reasonable interests accruing from March 6, 1986, the date the court issued a twenty-one page Opinion and Order denying plaintiff's motions to alter or amend judgment and which G.I.C.N.A. considers the final judgment in this case. Garlam argues that the non-finality of November 1982 judgment was only for appeal purposes and not for purposes of post-judgment interest.

As explained in the Opinion and Order of March 6, 1986, we consider the Court of Appeals' classification of our November 1982 judgment as not final to have been limited to the effects of such judgment on their appellate jurisdiction. This same reasoning applies when determining the effect of the November 1982 judgment on the calculation of interest, as provided by law for money judgments. The relevant statute provides that "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court..." and "[s]uch interest shall be calculated from the date of the entry of the judgment...." 28 U.S.C. section 1961. Section 1961 was amended in 1982 (effective October 1982) to provide a fixed method for determining the applicable rate ("a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of judgment," section 1961(a)). Appellate Rule 37 also refers to the date of entry of judgment as the date interest starts to accrue. In *United States* v. *Michael Schiavone & Sons, Inc.*, 450 F.2d 875, 876-77 (1st Cir. 1971) the court said:

> Regardless of whether the judgment itself contains a specific award of interest, once final judgment has been entered in a civil suit in a federal court the prevailing party becomes a judgment creditor and is entitled to post-judgment interest under the mandatory terms of 28 U.S.C. section 1961 [citations]...subsequent action by

> this court in reducing a judgment does not prevent interest from attaching upon the reduced amount from the date of the original judgment. . . .

Id.

In this protracted 1972 litigation which involves more than two million dollars, the evident purpose behind section 1961 of preventing the ravages of time from diluting a judgment creditor's monetaty recovery, *see Buck* v. *Burton*, 768 F.2d 285, 286-87 (8th Cir. 1985), acquires particular significance. Adopting the interpretation of G.I.C.N.A. of the appellate court's "finality" rulings to deprive Garlam of its statutory right to obtain interest on the November 16, 1982 judgment would defeat the purposes of section 1961, diminish its obvious relevancy to this case and serve as a windfall profit for G.I.C.N.A. who would gain from the earnings produced by the 1.3 million it has retained for more than thirty-six months. That judgment was set forth in a separate document, as required by Rule 58 Federal Rules of Civil Procedure, and it disposed of all pending matters. It adjudicated the liability of plaintiff and of its surety and specified the exact amount of their liability to Garlam. This judgment was entered by the Clerk in the case docket on November 17, 1982 as required by Rule 79(a), Federal Rules of Civil Procedure. There is no reason for denying Garlam the rights provided by section 1961 and allowing G.I.C.N.A. to profit on the basis of the rulings of the Court of Appeals on finality made for completely different purposes.

We hold that, pursuant to 28 U.S.C. section 1961, interest shall be calculated from November 17, 1982 in the manner set forth in section 1961(a). Third-party defendant General Insurance Company of North America's motion for execution of judgment is DENIED since the proposed supersedeas bond does not include the post-judgment interest from that date. Garlam's motion for execution of judgment is GRANTED. However, these rulings shall be held in abeyance for seven

working days from the notice of this order to allow G.I.C.N.A. to file a renewed request for stay of execution with a proposed supersedeas bond covering said interest, plus a reasonable additional amount to cover the interest that may accrue during the pendency of the appeal.

SO ORDERED.

At San Juan, Puerto Rico, May 19, 1986.

CARMEN CONSUELO CEREZO
United States District Judge

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U.S. DISTRICT COURT
SAN JUAN, P.R.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

EXPLOSIVES CORPORATION OF AMERICA,	
Plaintiff	Civ. 72-0001CC
vs	
GARLAM ENTERPRISES CORPORATION and FEDERAL INSURANCE COMPANY,	
Defendants	

OPINION AND ORDER

Explosives Corporation of America (Explo), plaintiff-counterdefendant, now judgment debtor, filed on August 15, 1985, a motion for Post Judgment Relief under Rules 59 and 52(b), Fed.R.Civ.P. Based on principles of collateral estoppel, it argues that the judgment of November 12, 1982 must be amended to conform it to the findings of fact and conclusions of law made by the Superior

Court of Puerto Rico, San Juan Part, in a judgment dated June 12, 1982 in Civil case 76-1431 Garlam Enterprises Corp. v. The Puerto Rico Highway Authority. We must tread the trail that led to this motion in order to understand it.

On August 8, 1985 we ruled that Rockor, Inc. was not the successor in interest of judgment debtor Explo. This ruling disposed of a motion for substitution filed by defendant-couterclaimant Garlam Enterprises Corp. (Garlam) under Rule 25, Fed.R.Civ.P., which in turn had been ordered to be filed by the court according to our Memorandum Opinion and Order of November 16, 1982 where Garlam's request for reconsideration of the court's October 1979 dismissal of Garlam's third-party action against Rockor, Inc. was denied, but the possibility of a post judgment substitution

was discussed. Since November 16, 1982 we had entered judgment in favor of Garlam for $2,423,177.00 pursuant to another Opinion and Order issued on that same day which adopted the Special Master's findings on damages. The issue of liability for the breach of the construction work contract between the parties was decided by visiting Judge Bootle in an Opinion and Order dated April 4, 1977.1/ On November 24, 1982

1/ This case was transferred to the undersigned's docket during the third quarter of 1980. After the Special Master filed his Report on April 1980, the parties filed numerous motions objecting to the Master's conclusions, questioning his integrity and challenging Judge Bootle's ruling on liability. The court held a hearing on June 1981 to discuss the possibility of submitting additional evidence. At the same time that these motions were being filed, Garlam also requested reconsideraion of Judge Pesquera's October 1979 dismissal of the third-party action against Rockor, Inc.

(See next page.)

Explo filed a document entitled Motion Under Rule 59 and/or Rule 52(b), Fed. R. Civ. P., stating that it had come upon a copy of the judgment issued by the Superior Court of Puerto Rico on June 15, 1982 in Garlam Enterprises Corporation v. Autoridad de Carreteras that would have a definite impact on the case once it became final. Explo argued that the findings of fact by the Commonwealth Court revealed "that Garlam might have been compensated by the Highway Authority for items Garlam claimed from plaintiff herein." Based on this it requested that

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(Continued from previous page.)

[sic] The reconsideration motions and opposition were referred to Judge Pesquera on February 1982 but he disqualified himself from ruling on them in July 1982. Our November 16, 1982 rulings dealt with the challenges to the Master's report and with the soundness of Judge Bootle's liability ruling as well as with the reconsideration of Judge Pesquera's dismissal.

we make new findings, without specifying which; that the award of damages to Garlam be reduced by an unspecified amount in excess of 1.9 million, without advancing any definite reasons for it, and that Explo be granted twenty more days to file a memorandum where it would set forth in detail the arguments and factual data necessary to support this motion. An opposition to this Rule 59/52(b) motion was filed by Garlam on November 29, 1982 contending that Explo was dissolved, nonexistent corporation which should not be allowed to continue making appearances before the court. On November 29, 1982 Garlam also filed a Motion under Rule 52 and/or Motion under Rule 59 and/or Motion under Rule 60 which was opposed as untimely. On December 14, 1982, Explo filed a memorandum in support of its Rule 59/52(b) motion urging that

since Garlam was able to recover from the Puerto Rico Highway Authority (PRHA) for excess costs due to faulty design, it should be allowed to reduce Garlam's award in this case as an equitable adjustment. On January 12, 1983 Garlam filed a more detailed opposition to Explo's request to alter the judgment. It now argued that the facts and issues in the case before the Puerto Rico Superior Court were entirely different from those in this action, thus making res judicata and collateral estoppel inapplicable. Explo replied on February 3, 1983 again arguing in favor of amendment. An order of February 16, 1983 denied Garlam's motion since, as a Rule 52/59 motion, it was untimely and as a Rule 60 motion, it failed to state specific reasons. On this same date, Explo's Rule 59/52(b) motion of November 24, 1982 was also

denied as vague and speculative. Explo's memorandum of December 14, 1982 was considered by the Court as an untimely motion under Rule 59/52(b). We expressly stated that Explo's November 24, 1982 motion in which it requested twenty more days to state what it should have included then was just an attempt to circumvent the ten day jurisdictional term of Rule 59 and that its December 14, 1982 memorandum could not be considered for lack of jurisdiction. Explo then filed a Notice of Appeal from the November 16, 1982 judgment and the February 16, 1983 order denying its Rule 59/52(b) motion of November 24, 1982.

While the Rule 59/52(b) controversy was pending, Garlam filed on December 15, 1982 the Rule 25 petition to substitute Explo with Rockor, Inc. [sic] as judgment debtor, as suggested by the Court, and so

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began the process to summon the out of state party to be substituted. Explo opposed the Rule 25 motion and what ensued was a battle which lasted almost two years, prompted in part by Rockor's [sic] obstinacy in failing to even recognize the court's jurisdiction to determine whether substitution was proper. In the midst of this procedural joust, Explo's appeal of the November 18, 1982 judgment was dismissed for the Court of Appeals understood the judgment was not final for purposes of an appeal since the Rule 25 motion was pending resolution.

In view of this ruling, Explo renewed its requests for Rule 59/52(b) amendments to the November 16, 1982 judgment and filed a motion and memoranda based essentially on the same grounds as its December 1982 memorandum, only this time

within ten days of what it considers to be the "final judgment:" our Opinion and Order of August 8, 1985 disposing of the Rule 25 motion. This renewed motion was opposed by Garlam on January 17, 1986. The final twist to this imbroglio came on October 10, 1985 when the Circuit Court dismissed Garlam's appeal of the November 16, 1982 judgment which it filed after we ruled on the Rule 25 motion, confident perhaps that all "pendent" matters precluding an appeal had been resolved. Not so. The Court said that Garlam itself had claimed in the prior appeal effort that the November 1982 judgment was not final and the ruling on the lack of finality of our November 1982 judgment was "the law of the case." The Court also pointed out that there was a post-judgment motion pending and that "it appears that no final judgment has been

entered in this matter." The court mentioned that "adjudication of Garlam's motion for substitution of parties in and of itself does not constitute entry of a final judgment" and drew our attention to this "absence" of an entry of judgment so that we clarify or correct it.

We view the Circuit Court's reference to the lack of finality of the November 1982 judgment as a voluntary declination of their jurisdiction to entertain an appeal of this case rather than as a determination of its finality for other purposes of law. The November 16, 1982 judgment disposed of all claims against all parties. This is precisely why we said in our November 16, 1982 Memorandum Opinion and Order that Garlam's reconsideration had to be denied but a post-judgment Rule 25 motion could be considered. We explained in that order

the implausibility of joining Rockor as a third-party defendant in an ongoing litigation where liability had already been established but considered that the substitution of Rockor as a successor in liability of judgment debtor Explo was possible through the mechanism of Rule 25 which may be used even after a judgment is final because of the separateness of the Rule 25 procedure from the establishment of liability in a given case. The difference between joining a party to an ongoing litigation and substituting a litigant that is already part of an ongoing litigation is that the joinder looks to the new party's relationship to litigation whereas the potential Rule 25 substitute looks to its relationship to the party already in the case and not to the nature of the case. It must also be pointed out that finality of judgment for

purposes of appeal is not necessarily the same as finality for other purposes, such as, for example, preclusive effects of the judgment. See Miller Brewing Co. v. Jos. Schlitz Brewing Co., 605 F.2d 990, 995-96 (7th Cir.), cert. denied, 444 U.S. 1102 (1980).

The fact that Explo's Rule 52(b)/59 motion can be entertained does not explain why it waited until November 24, 1982, when our judgment was already final in terms of preclusive effects, to bring to our attention the Superior Court's judgment of June 15, 1982. Explo has not explained either why it never sought intervention in the Commonwealth case or why it did not request joinder of the claim against Garlam for the equitable unit price reduction it could have allegedly derived from Garlam's contract with the PRHA. The record shows that the

Superior Court case was known and monitored by Explo throughout the years. Explo continuously referred to the pleadings filed in that case and even submitted part of the Superior Court's record as evidence for the Special Master to consider in his determination of damages. Explo's argument that it was not necessary for it to intervene in the Superior Court action because that case dealt with other matters is self-defeating. The Puerto Rico Rules of Civil Procedure allowed Explo to appear in that action to plead precisely the third-party beneficiary status theory that it has now attempted to introduce in this case. Likewise, it could have joined as a party in the two actions. Instead, it adopted a wait and see attitude and never formally raised this new theory of equitable price reduction in

this litigation or in the one before the Superior Court. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329-331 (1978).

Res judicata and collateral estoppel are doctrines which service purposes of convenience and practicality in avoiding multiple litigation as well as in furthering the public interest in finality of controversies. See Itco Corp. v. Michelin Tire Corp., Com. Div., 722 F.2d 42, 50 (4th Cir.), cert. denied, ___ U.S. ___, 105 S. Ct. 1191 (1985). They are to be raised affirmatively and at the earliest moment to minimize the harm to the other party, see Evans v. Syracuse City School Dist., 704 F.2d 44, 47 (2d Cir. 1983); Nevels v. Hanlon, 656 F.2d 372, 375-76 (8th Cir. 1981), and to maximize the interests they serve. It must also be remembered that res judicata is essentially an equitable doctrine that should

not be applied to reach inequitable results. See Walsh v. Intern. Long Shoremen's Ass'n., AFL-CIO, 630 F.2d 864, 875 (1st Cir. 1980). Application of the doctrines to the particular circumstances of this case in the manner sought by Explo will result in an inequitable and absurd situation, not the least justified by movant's conduct. The presentation of this matter after the court had already ruled on all pending matters and had entered a final judgment[2/] further undermines its untimely request for the application of res judicata or collateral estoppel. See John v. Rogers, 621 F.2d 300, 305 (8th Cir. 1980); Southern Pacific Communication Co. v. American Tel. & Tel. Co., 567 F.Supp. 326, 329

2/ The final judgment was preceded by a partial judgment and multiple rulings entered before those issued in the Superior Court.

(D.C.D. 1983), aff'd. 740 F.2d 1011 (D.C. Cir. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 1359 (1985). Its blatant inaction before the Puerto Rico or federal courts in failing to raise this equitable right to benefit from the main contract theory, also belies the validity of its argument. Cf. Macko v. Byron, 555 F.Supp. 470, 480 (N.D. Ohio 1982), aff'd. 760 F.2d 95 (6th Cir. 1985) (having defendants consented by inaction to separate trials of defamation and civil rights issues, they could not now assert a victory in the state case as a technical bar to the federal claim). Furthermore, even considering Explo's collateral estoppel argument as a timely one, it has failed to meet its burden of proving that preclusion applies in the manner suggested. See Manning v.

Grimsley, 643 F.2d 20, 23 (1st Cir. 1981).

First of all, Explo's characterization of the two judgments as being preclusive is erroneous. The Commonwealth case to which Explo was never a party originated as a result of Garlam's dissatisfaction with the payment for the completed work by the owner of the construction project. That work involved much more than the blasting of rock, and that action was based on a specific contract between Garlam and PRHA. Garlam, as the principal contractor for the project, sought recovery for general excess costs on completion of the entire work which it deemed were the result of the owner's deficient planning and other shortcomings. The Superior Court in its judgment of June 15, 1982 reduced Garlam's claims of excess costs to

$2,466,318.73. The court made specific findings on many items of the general overall construction work and it did not rule on any matter dealing with Explo's subcontract for the blasting of the rock. It did not need to, for Garlam did not litigate this aspect of the general construction work in that case in view of the pending federal action where this matter was being litigated. The blasting item was not even specified in the general construction contract but was included in the general item of excavation work. Thus, the Superior Court's judgment does not conflict or preclude the judgment in this case. Rather, the two judgments complement each other. In the Commonwealth case, the court ruled as to the construction work as a whole and on the duties and liabilities in relationship between the main contractor and

the owner. In the present case, the Court adjudicated the controversies on a specific part of the overall construction work, the blasting and pre-splitting of rock pursuant to the contract between Explo, the blaster-subcontractor, and Garlam, the principal contractor. Contrary to Explo's contention, Garlam did not recover twice from the PRHA and Explo for the blasting performed by it when Explo abandoned the job. Garlam obtained regular compensation from PRHA for the blasting it had to perform upon Explo's default. The excess cost of completing the blasting phase it chose to recover from Explo in the instant case, rather than claiming it from the PRHA in the Commonwealth case, as was its contractual prerogative. The 1982 findings of the Superior Court of Puerto Rico as to PRHA's defective preconstruction stud-

ies and plans, do not reveal that the excess costs which Garlam recovered from Explo for the blasting were necessarily the result of these errors. These findings have to be limited to what the Superior Court had before it: the payment for the complete construction project according to the contract between Garlam and the PRHA. The fact that the Superior Court concluded that the PRHA's design of the project as a "balanced" one was erroneous, in view of a mistake in the interpretation of the photogrametric survey on which the design was based, does not support the leap taken by Explo in contending that this error in design also contributed to all the excess costs that Garlam recovered from it for completion of the blasting phase. It is simply impossible to determine from the Superior Court's opinion

just how this defect could have affected Explo's liability. The Superior Court found that the error in the photogrametric study consisted in projecting the ground line higher than actual because dense vegetation in some areas distorted the photography. The result of this was that the project was not "balanced" and Garlam had to obtain fill material from an adjoining pit to "balance" the cuts, the excess costs of which Garlam recovered from the PRHA in the Superior Court case. There is no finding or comment in the Superior Court's judgment on how this design error affected the blasting or as to the hardness or particular quality of the rock, Explo's battle cry throughout these proceedings and its justification for having to abandon the work prematurely. Moreover, upon Explo's own request, the

Special Master in our case considered evidence related to many, if not all, of Garlam's contentions against the PRHA in the Superior Court case and examined their effect on Explo's limited responsibilities in the overall construction work. The Special Master specifically reduced, from approximately five million to two million dollars, many of the items requested by Garlam from Explo, including costs to obtain fill material in view of the Superior Court case and the design error theory, which the Special Master considered. The Special Master, as we indicated in our Opinion and Judgment of November 12, 1982, took painstaking care to distinguish Explo's contribution to Garlam's excess costs in completing the blasting work from the faults of the PRHA in other aspects of the project which also contributed to excess costs. The

Superior Court's judgment of June 15, 1982 did not touch upon any of these matters which were specifically ruled upon by the Special Master in our case.

Explo seems to indirectly recognize the separateness and uniqueness of each of these two actions. Its main challenge is that Garlam should have exercised its right to seek readjustment of the unit price per the Garlam-PRHA's general construction contract's clause 4.3,3/ in

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3/ As indicated in our translated copy of the superior court's judgment part of the clause reads:

4.3 Increased or Decreased Quantities of Work-The Authority reserves the right to make any alterations in plans and changes in the quantity of work and in the quantity of materials to be furnished as may be necessary or desirable to fully complete the proposed construction in a satisfactory manner and the contractor shall perform the work in accordance with the changed plans. It is recognized that these changes are normal

(See next page.)

view of the Superior Court's finding of a more than 25% overrun. Explo contends that Garlam's failure to assert this contractual right with respect to the blasting portion of the overall construction should now preclude it, or collaterally estop it, from recovering

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and expected adjustment and that they do not permit changes or modifications of the contract prices provided the resulting overruns or underruns from the quantities in the proposal do not exceed reasonable percentages. These percentages and the method to be followed are fixed as a part of the contract as follows:

3(d) It is mutually agreed, that, if demand is made by either party, overruns or underruns in any or all items resulting in a sum total change of more than 25% of the total cost of the contract calculated from the original proposal quantities and the original contract unit price, shall require a supplemental agreement signed by the Director and the Contractor setting forth the necessity for the change and the adjustment of unit prices agreed upon as satisfactory to both parties.

excess costs for blasting from Explo. Explo argues that as a construction contract subcontractor it has an equitable right to benefit from this price readjustment clause and to reduce its liability to Garlam in proportion to the renegotiated unit price Garlam should have obtained from the PRHA for the blasting work. It requests an additional evidentiary hearing to determine the exact reduction. This argument is more a motion for reconsideration of the findings of Judge Bootle in 1977, and of the Special Master's in 1980, than a Rule 52(b)/59 motion to alter judgment on grounds of collateral estoppel. In any event, it has many flaws. First of all, the Superior Court's finding on a 25% overrun cannot be telescoped into this case and the particular contractual relationship that was here considered. It

just cannot be determined from that judgment how the overrun percentage would apply specifically to the Explo-Garlam item of work. Clause 4.3 does not provide that for a certain percent of overrun the unit price will be modified in a certain way. It merely permits the parties to renegotiate the price. It would be sheer speculation to say what Garlam and the PRHA would have negotiated as a reasonable unit price of work for a particular item of work which was not even specifically included in the general construction contract. Furthermore, the clause's own language defeats Explo's interpretation. It starts out by stating how the owner has "the right to make any alterations in plans and changes in the quantity of work and in the quantity of materials to be furnished as may be necessary or desirable to fully complete the

proposed construction in a satisfactory manner and the contractor shall perform the work in accordance with the changed plans." The clause provides that these changes are considered normal and in protection of the contractor's rights; should they be in excess of 25%, the contractor may demand negotiation. The language of this clause presupposes that the overrun be attributed to the PRHA change or alteration of plans. The Superior Court decision does not specifically connect those changes or alterations caused by the PRHA that increased the overall costs and enabled Garlam to renegotiate, with the blasting item of work. The Special Master, however, found that Explo's breach, by itself, contributed to the excess costs of the blasting portion. There is nothing preclusive or contradictory between the

Superior Court's decision and ours on this particular matter. To the contrary, if Explo's theory were feasible, the Superior Court would probably have rejected it for some of the excess costs of the blasting were attributed to Explo, and PRHA could convincingly argue that the renegotiation provided in clause 4.3 was unjustified unless PRHA were liable for the excessive costs incurred in completing the blasting.

The second tier in Explo's collateral estoppel challenge is the conclusion that the contract between Garlam and the PRHA and the subcontract between Explo and Garlam can be juxtaposed harmoniously to permit Explo to obtain a renegotiated unit price for the blasting. More than an application of res judicata preclusion, this requires that we interpret the contractual rights of Garlam, Explo and

PRHA pursuant to each of their contractual relationships. The Superior Court did not make any finding on such an interplay. In our case, Judge Bootle was not placed by Explo in a position to make this finding. As for the Special Master, he did not have to wander into speculative situations such as this to determine the issue of damages given the specific provisions in the subcontract that deal with the abandonment of performance. It should also be noted that this equitable adjustment claim was never formally incorporated in the pleadings nor was it an essential theory of the case which focused on whether Explo's abandonment of

the project was justified because of the rock's hardness.4/

In any event, an examination of the contracts mentioned according to the legal principles designed for such analysis, P.R. Laws Ann. title 31 sections 3471, et seq., reveals that the contracts cover very different situations and

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4/ Way back in 1972 when this litigation commenced, the central issue was precisely whether Explo had to blast the rock to a certain average size. Judge Bootle found that the contract required that fragments be of a certain size and that Explo was having trouble fulfilling this requirement. Hence, the importance of the hardness of the rock. During the damage assessment stage of the litigation before the Special Master, Explo's central concern with the design error which caused the project to be an "unbalanced" one, lay in preventing Garlam from recovering from Explo the excess costs of the material brought as fill to balance the excavations which, as we mentioned, wa in fact considered by the Special Master and reduced from Garlam's claim against Explo. The precise manner in which this design error affected the original question regarding the rock's hardness has never been addressed to by Explo.

responsibilities and cannot be interpreted as Explo contends, even assuming we should entertain its request. The general construction contract between Garlam and the PRHA dealt with a number of work items that depended upon each other, were subject to many factors and covered a longer period of time. Explo's performance under its subcontract with Garlam had to depend upon the general contract's requirements and performance schedules. However, this is not tantamount to incorporating into the subcontract the rights of Garlam under the principal contract. There is no mention of any such subrogation right with respect to Explo's unit price for blasting. An integrated reading of Explo's subcontract and an understanding of its role in the general construction project reveals otherwise. Explo's work was one of the first items

in the schedule. It was paid following a very detailed process according to amount of rock satisfactorily blasted and there were specific provisions for changes in the amount of work. After a certain section of blasting was performed, the main contractor, Garlam, would remove and clear the materials blasted and would then ascertain whether the blasting was satisfactory, that is, whether the rock fragments left averaged a certain size. Explo was contracted to blast a certain amount of rock at a given unit price. The subcontract, however, covered the situation in which extra blasting had to be performed. Pursuant to Art. VIII(g) the parties had to agree before extra work could be performed. Garlam, on the other hand, was paid by PRHA for the finished product based on a prestipulated price. If it had to incur additional work to

complete the projects, then it ran the risk of a nonprofitable venture. In Explo's case, if more blasting was necessary, it could obtain additional compensation from Garlam for the increased work or pack its bags and leave.

In sum, we have two separate contractual relationships between two different parties in two very distinct situations. The duties and liabilities of each are quite different and depend basically on interpreting the obligations arising from each one of the contracts involved. In the instant case we have examined the contractual relationship between Explo and Garlam. It was under that contract that Judge Bootle determined the issue of liability. The Special Master applied the specific provisions and the formula of the subcontract relative to the recov-

ery of damages upon abandonment of work. There was no need then, nor is there any now, to consider or apply any other standard. In addition, Explo's equitable right of subrogation stands on very weak grounds, considering the fact that it was Explo who abandoned the contract in the first place.

The full faith and credit statute requires that federal courts give final judgments of state courts preclusive effect, as such preclusion is applied between state adjudicative forums. 28 U.S.C. 1738; Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75 (1984); Kremer v. Chemical Const. Corp., 456 U.S. 461 (1982). In Puerto Rico, the doctrine of claim and issue preclusion is codified in article 1204 of the Civil Code, P.R.

Laws Ann., Title 31 section 3343 which provides:

> Only a judgment obtained in a suit for revision shall be effective against the presumption of the truth of the res judicata.
>
> In order that the presumption of the res judicata may be valid in another suit, it is necessary that, between the case decided by the sentence and that in which the same is invoked, there be the most perfect identity between the things, causes and persons of the litigants, and their capacity as such.

The Supreme Court of Puerto Rico has rejected the trend in some jurisdictions of abandoning the mutuality or identity requirement, in view of the Civil Code's express mandate on this aspect. A & P Gen. Contractors v. Asoc. Cańa, Inc., 10 Official Translations of the Opinions of the Supreme Court of Puerto Rico 983, 110 D.P.R. 753 (1981). The identity of persons requirement mentioned by the Code is

also met "whenever the litigants of the second suit are legal representatives of those who litigated in the preceding suit, or when they are jointly bound with them or by the relations established by the indivisibility of prestations among those having a right to demand them, or the obligation to satisfy the same." Title 31, Section 3343. The "thing" referred to by the Civil Code is the object to matter over which the action is exercised, Lausell Marxuach v. Díaz Yañez, 3 Official Translations of the Opinions of the Supreme Court of Puerto Rico 742, 103 D.P.R. 533 (1975), while cause is "the principal ground, the origin of the actions or exceptions raised and decided . . . " Id.

In the present case one cannot conclude that there exists the "most perfect identity" in person, cause and thing

between the Superior Court case and this federal litigation. The parties are by no means identical nor can they be considered legal representatives. Each case deals with a different contractual relationship covering quite distinct performances and liabilities. The judgment of the Superior Court case did not adjudicate any matter with respect to the Explo-Garlam subcontract. The overrun finding in that caes has to be viewed within the context of the different controversies before that court. The fact that the Superior Court found no fault in the PRHA for the overrun of the construction project is not preclusive of Judge Bootle's prior finding that Explo was at fault regarding its particular duties under the blasting subcontract. Contrary to the Superior Court's general findings of overrun attributed to PRHA, the

Special Master distinguished which excess costs could be attributed to Explo's fault in breaching the contract and which were the result of other parties. Absent a specific finding by the Superior Court with respect to the blasting portion of the construction, the object of the case before us, we see no reason to ignore the Special Master's specific findings on this matter based on an untimely and unsound collateral estoppel challenge. As to Explo's contention that it should be entitled to a unit price reduction, the Superior Court judgment made no findings so as to to conclude that this contractual interpretation of both contracts should be applied in this case through collateral estoppel. If Explo pretends to raise this issue by way of a disguised reconsideration, there is no need to reconsider the prior rulings on

liability or the Special Master's findings and application of the method specified by the subcontract for the determination of damages in the event of abandonment of the work. In addition, Explo's failure to channel this claim through the proper procedure and its delay in presenting it to this court, also contributes to divest its petition of any discernible equitable or legal value, or, for that matter, any sense in terms of the purposes behind this case and issue preclusion doctrine, given the trajectory of this protracted litigation.

Explo's Motion for Post Judgment Relief under Rules 59 and 52(b) Fed. R. Civ. P. of August 15, 1985, is hereby DENIED. Considered as a Rule 60(b) Fed. R. Civ. P. motion for reconsideration, it is also DENIED. For purposes of

an appeal, the Clerk shall enter this Opinion and Order as a Final Judgment.

SO ORDERED AND ADJUDGED.

At San Juan, Puerto Rico, on March 6, 1986.

CARMEN CONSUELO CEREZO
United States District
Judge

72398

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

EXPLOSIVES CORPORATION OF AMERICA,	)	
Plaintiff	)	
vs	)	CIVIL 72-0001CC
GARLAM ENTERPRISES CORPORATION & FEDERAL INSURANCE COMPANY	)	
Defendants	)	

OPINION AND ORDER

The construction of that part of the Las Americas Expressway that traverses through the rugged terrain of the central mountains of Puerto Rico generated this case which has unfortunately dragged on for more than a decade and which serves to prove that it is easier to build bridges between mountains than bridges between minds. On January 3, 1972,

Explosives Corporation of America (Explo), a Washington corporation, filed this complaint alleging breach of contract by its prime contractor Garlam Enterprises Corporation (Garlam), a Puerto Rico corporation, and its surety, Federal Insurance Company, Inc. Garlam had been hired by the Puerto Rico Highway Authority (PRHA) to build that part of the San Juan-Ponce Expressway which passed through an area of the Cayey Sierra called Las Palmas-Cerro de los Cielos (Project Number AC-52(R)12(70)). Garlam, in turn, subcontracted Explo for the pre-splitting and blasting operations required by the project. On July 6, 1972, Garlam answered the complaint and counterclaimed, also for breach of contract, against Explo and its surety General Insurance of America. The issue of liability was determined by Judge

W. T. Bootle[1] in an opinion and order of April 4, 1976, later amended nunc pro tunc (Opinion). Judge Bootle made the following findings relevant to the liability issue.[2]

During the period of approximately five months that Explo worked on the project "it did not comply with the interpretation of Garlam as to the maximum rock size" of the rock debris left after blasting. According to the court's findings, the contractual requirement was that the rock fragments remaining after blasting could not exceed fifteen (15) inches in diameter. The court also found that "initial personnel of Explo in this project were not very proficient in blasting techniques," thus, many erratic

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1/ Senior Judge for the Middle District of Georgia, sitting by designation.
2/ Additional detailed findings of fact can be found in this opinion.

decisions were made; and that Garlam was "entitled to direct the work of Explo from day to day." Explo was found liable to Garlam because the evidence failed to establish any substantial nonpayment by Garlam so as to justify Explo's deficient performance and its midproject abandonment. The measure of Explo's liability was "the actual and necessary additional costs reasonably incurred by Garlam in order to complete the work required of Explo by the subcontract." The Court, however, was quick to indicate the limits of its holding and left for determination at the second trial on the issue of damages, the following matters: the deduction made by Garlam on the amounts due to Explo in compensation for the

oversize rock fragments;[3] the amount owed to Explo for the work it rendered;[4] the amount of damages chargeable to Explo, if any, due to late completion of the work; whether any delay penalty may be charged to Explo; the interests on the amounts; and whether General Insurance of America's liability is limited to the

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[3] Under the circumstances due to the oversize of the rock fragments, the suggestion of an allowance of only 50% by Garlam was not an unreasonable one, and constituted a good faith gesture on its part. This finding shall in no sense be controlling or binding during the second trial of this case in which the issue of damages will be primarily and directly involved. . . ." (Opinion at p. 6).

[4] "Explo is entitled to be credited in exchange for the work done by it . . . on the basis of the agreement . . . at the rate of 51 cents per cubic meter of blasted rock and 70 cents per linear foot of pre-splitting." Id.

penal sum of $1,230,000.00 named in the payment and performance bond.5/

The discovery proceedings that ensued demonstrated that the determination of damages was a task of olympic proportions that required highly technical expertise in engineering. The court's suggestion of appointing Ulises Barros as Special Master under Rule 53 Fed. R. Civ. P. to determine the damages caused by Explo's breach was accepted by the parties and an Order of Reference was entered on September 12, 1979. According to this order, the Special Master was to aid the court in assessing the amounts, if any, which may be due to Garlam. The court suggested that the Special Master make

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5/ This question was decided by Summary Judgment of October 21, 1977, limiting liability only up to the penal sum mentioned in the bond, that is, $1,230,000.00.

findings on the following facts: the quantities of rock drilled and shot within and outside the original contract limits, or used as borrow material and the quantities and cost of these activities by Explo and Garlam at different times throughout their participation in the project. Findings on the reasons for delay and the entities responsible for it, the amount invested in additional equipment and any other findings that the Master deemed necessary, were also suggested. The Order of Reference imposed the cost of compensation of the Special Master on Explo.

The Special Master held two days of hearings where the parties presented their testimonial and documentary evidence. A preliminary report was filed and the parties presented their opposition and comments. Garlam claimed that

the Preliminary Report favored Explo, violated the guidelines of Judge Bootle's opinion and the Order of Reference, made findings without being supported by the evidence on record and contained simple mathematical errors. Explo contested the Preliminary Report as failing to demonstrate that Garlam fulfilled its burden of proof so as to justify the award of damages. On April 24, 1979, the Special Master submitted his final report (Report) to the Court which considered the previously filed objections along with the determination of damages. The Special Master found that Garlam's damages amounted to $2,170,034.00 plus $253,143 for interests. The Report addresses the findings suggested by the Order of Reference and determines that Explo's work consisted in blasting 70,086 cubic meters and pre-splitting 4,909 lin-

ear feet at the stipulated contract price of 51 cents per cubic meter of blasting and 70 cents per linear feet of pre-splitting for a total of approximately $39,180.00. This sum was set off by the Special Master against Explo's debt to Garlam and included as a "credit" to Explo. Also credited were the amounts corresponding to Garlam's work within the original contract limits before and after Explo's performance and not attributable to Explo's breach. This sum, together with the amounts set off for Explo's work, amounted to $1,723,295.00. The Special Master then subtracted this amount from the total cost to complete ($3,610,281.00) this phase of the project and fixed the sum of $1,886,986.00 as the additional cost to complete attributable to Explo's breach. To this he added the 15% for overhead and profit stipulated in

the subcontract, plus $253,143.00 for capital interests accrued to the direct cost to complete the project, and arrived at the sum of $2,423,177.00 as the total amount of additional costs incurred by Garlam which were related to Explo's conduct and which constituted the damages suffered by Garlam due to Explo's breach of contract.

We take the time to describe these totals to clear any confusion that the parties may have due to the highly technical descriptions contained in the report. The main confusion that we perceive from the parties' briefs stems from the misconception that Garlam was entitled to recover all delay and excess costs incurred in the project. The Master considered that several items claimed by Garlam were not attributable to Explo's breach. There were many fac-

tors affecting the project and resulting in extra cost[6/] which the Special Master took the effort to isolate to determine which were attributable to Explo. Although this was certainly the most difficult way of approaching the task, it was undoubtedly the only way the determination of damages could have been made in harmony with the dictates of the Opinion, the Order of Reference and the Law of contractual damages in Puerto Rico. It would have been clear error for the Master to determine that Explo was liable for all additional and regular costs in completing the entire project which entailed, not only pre-splitting and

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6/ The construction of this part of the expressway was originally contracted at $13,489,412.39 to be finished in 600 consecutive calendar days. The final project took 2152 days to complete and Garlam is claiming $35,328,410 as final cost.

blasting part of the mountains, but also the construction of bridges and roads and other general construction work required by this type of highway. Such determination would have been not only manifestly erroneous but would have created an obvious inequitable situation by permitting Garlam to recover twice the amounts for the same item of work, once from Explo and again from the PRHA. Although Garlam made repeated efforts to cloak its relationship with PRHA and its pending claims, the Special Master could not be blind to this reality. With this situation in mind, we now turn to the parties' respective oppositions to the Report.

Besides its challenge to Garlam's burden of proof on damages, Explo contends that the Report now demonstrates that the amounts owed to it by Garlam were substantial and that Judge Bootle's

opinion is premised on a mistaken assumption and must be overruled. Garlam's opposition consists basically of the same arguments previously voiced in addition to a "Due Process" claim. The violations to the Due Process Clause of the United States Constitution claimed consist of an alleged "private and secret" conversation that the Master conducted with a witness during a recess in the proceedings and of his consideration of evidence not on record. The court held a hearing on June 3, 1981 to address this matter where both Parties had the opportunity to present evidence and to question the Special Master. We shall first consider the "due process" claim.

Garlam's major source of concern on the allegedly extraneous pieces of evidence considered by the Special Master, is the record of a related case which it

filed in the Superior Court of Puerto Rico[7/] against its contractor, the Puerto Rico Highway Authority (the PRHA case). It contends that the Special Master based many of his conclusions on documents and pleadings filed in the PRHA case. It also points out that Explo attached to its post-hearing memorandum several documents (Exhibits V-X) that had not been previously submitted as evidence and that the Special Master relied on them to support his findings and conclusions. Explo's position is that these documents are mere summaries of others already in evidence which were submitted with the post-hearing memorandum for the sole purpose of supporting its arguments. The documents consist of: Exhibit V, Unclassified Excavations--a chart com-

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7/ Civil Case No. 76-1431, Garlam v. PRHA.

paring quantities of rock certified by Garlam with quantities of rock certified by the PRHA; Exhibit VI, another chart comparing discrepancies in the cross sections and hatch lines; Exhibit VI-A, seismic studies--comparative analysis of graphs and certifications of removed rock; Exhibit VII, Garlam's brief in the PRHA case; Exhibit VIII, samples from the daily reports; Exhibit IX, reports showing problems with Garlam's equipment; and Exhibit X, breakdown of repair and service to equipment charged by Garlam to Explo. Garlam also contends that during a recess in the proceeding the Special Master approached Engineer Da Silva, a witness, and spoke to him for about twenty minutes in the hallway of the courthouse.

At the hearing before us the Special Master, under oath, indicated that these

exhibits were not used to support his conclusion, since they were only summaries of documentary evidence presented previously during the proceedings before him. These summaries, together with similar ones prepared by the Master, were used to aid him in sorting out and organizing the innumerable data already on record. He indicated that, except for the typing, all the analysis, studies, examinations and conclusions were made solely by him and without resort to any outside information or help. Upon Garlam's inquiry, the Master stated that several textbooks dealing with road construction and explosives were consulted to aid him in his analysis. As to the PRHA case, he indicated that he only considered that part of the record of the PRHA case that was submitted in the instant case. When questioned about his

hallway conversation with Engineer Da Silva, the Special Master testified that the conversation was inconsequential and unrelated to this case. He was then questioned on the nature and source of Exhibit VIII to which he replied that it was a summary derived from the daily activity reports submitted by Explo during the hearings as Exhibit J. No further questions were asked of Mr. Barros and Garlam did not present any other witness or evidence in support of its position. It is necessary to consider the legal criteria which are relevant to a determination of the validity of these objections.

The applicable standard of review upon evaluating the Special Master's conclusions requires that the findings be given great weight and not disregarded unless clearly erroneous. De Costa

v. Columbia Broadcasting Systems, Inc., 520 F.2d 499, 508 (1st Cir. 1975); United States v. S. Volpe and Co., 359 F.2d 132, 134 (1st Cir. 1966); see Masters and Magistrates in the Federal Courts, 88 Harv. L. Rev. 779, 789-96 (1975).8/ Although the master may disregard evi-

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8/ We consider Garlam's "due process" claim as another form of voicing its objections to the Special Master under the "clearly erroneous" rule because Garlam has not presented to us authorities in support of the constitutional aspects of its argument and its particular factual basis. This lack of elaboration makes the configuration of the 'due process' claim difficult, if not impossible to perceive, and, without dwelling too deeply on this point, the merits of the claim appear also of dubious value considering that the Special Master's findings are mere recommendations that cannot be enforced without the Court's approval. See D.M.W. Contracting Co. v. Stolz, 158 F.2d 405 (D.C. Cir. 1946); In re Mifflin Chem. Corp., 123 F.2d 311 (3rd Cir. 1941). In any event, indicate any serious impropriety on the Master's conduction of the proceedings, whatever due process claim that can be sketched from Garlam's allegations also fails to materialize from the Master's conduct.

dence he considers of his own without following ordinary judicial procedures. Baker v. Simmons Company, 325 F.2d 580, 583 (1st Cir. 1963). However, use of reference books to aid a master in the technical aspects of the evaluation is permitted. See id. at 583, n. 3. The objections to a master's findings must be specific, United States v. Merz, 376 U.S. 192, 199 (1964); AFL-CIO v. NLRB, 547 F.2d 575 (4th Cir. 1976) cert. denied 431 U.S. 966; Badger By-Products Co. v. Employers Mut. Cas. Co., 65 F.R.D. 4 (E.D. Wis. 1974) aff'd. 519 F.2d 1406 (7th Cir. 1975), and the party challenging the findings carries the burden of demonstrating the existence of "clear error." NLRB v. Crockett Bradley, Inc., 598 F.2d 971 (5th Cir. 1979).

In the present situation, we conclude that Garlam failed to carry its burden of

proving that Special Master Ulises Barros relied on evidence not on record to support his findings. Each one of the exhibits accompanying Explo's memorandum of law contained information that had been offered at the hearings and the findings of the Master do not rest solely on these exhibits. In fact, even under the stricter standard of review of mixed questions of law and fact, see: Da Coste, ante, we find that they are merely supplementary and illustrative of information already existing in the record.

At the hearing, Garlam limited its showing of the Special Master's error to questioning him on only some of the allegations of improper behavior. Yet, even these failed to indicate that he acted erroneously. For example, although Garlam spent the greater part of the

hearing questioning the Special Master about his reliance on the daily activity reports, it could not controvert the fact that these reports had been submitted as evidence and that Exhibit VIII was only a summary of some of them. Garlam also failed to pinpoint what specific material from the PRHA case that was not presented as evidence before the Special Master was used by him to support a certain finding. Specificity on this matter was necessary since many documents from the PRHA case were in fact presented as evidence during the hearing. The Special Master's statements under oath in response to the court's questions also remained uncontradicted by Garlam and a review of the record reveals that they contain information found in evidence that had been previously submitted, particularly in Exhibits A, 10, 10A, G, 13, 31, 30, J,

JI, and B and in the testimony of the witnesses at the hearing. After the hearing the accusation that the Special Master conversed with the witness on matters related to the case was left unfounded and remained only as a hasty comment by an overzealous lawyer who in pursuit of his client's interest apparently lost sight of the damaging side effects of such type of imputations.9/ Since the "due process" claim has not been substantiated by Garlam, the request to set aside the Master's Report on that ground is DENIED.

As to the objections to the report, we first confront Explo's basic quarrel

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9/ We also note the belatedness of this objection. Although counsel for Garlam stated that he saw the Special Master talking in the hallway with Engineer Da Silva, he did not inform the Court or the Master of his concern or objection until after the Report had been filed.

with the Master's findings on the necessary burden of proof of damages on the item of rock blasted. It contends that Garlam failed to carry this burden by not making the cross-section measurements of the blasted rock in the field, as required by the contract, which was the only reliable way of ascertaining the measure of damages. It does not contend that the Master's method of determining these quantities was erroneous, but rather, that the lack of cross-section measurement was a failure by Garlam of meeting its burden and that dismissal was mandated. The Master, although recognizing the difficulty in arriving at precise figures due to the lack of adequate information on the record, did rely on other methods to arrive at the conclusions. He also found that the party responsible for the breach (Explo) should

not benefit from any difficulty in computing damages. Although we recognize that the Special Master was not designated to make such a finding, we believe it is not necessary to determine whether the principle of law referred to was correctly applied[10/] because his findings on this matter are not mere conjecture. These findings are supported by the preponderance of evidence on record and are the result of mathematical computations that give the most precise approximations possible under the circumstances. This analysis is derived from facts established by the evidence before him and under the "clearly erroneous" standard of review Explo must demonstrate that there is absolutely no rational support in the

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10/ See: Trans World Airlines, Inc. v. Hughes, 449 F.2d 51, 72-3 (2nd Cir. 1974).

record for the Master's conclusions. See: Western Geophysical Co. v. Bolt Associates, Inc., 584 F.2d 1164, 1174 (2nd Cir. 1978). Otherwise, it would practically require that the reviewing court make a de novo determination of the factual issues to determine which should be given more weight. See: Zenith Radio Corp. v. Hazeltine Research. Inc., 395 U.S. 100, 123 (1969); Matley v. United Shoe Mach Corp., 54 F. Supp. 694 (D. Mass. 1944). Explo must show that it is clearly erroneous to conclude that the weight of the evidence is sufficient to support the Master's conclusions and determinations. Cf: United States v. 79.95 Acres of Land, 459 F.2d 185, 187 (10th Cir. 1972) (award duly appointed commission in expropriation proceeding may be adopted by trial court unless contrary to clear weight of the evidence).

We believe no such error has been shown. The important consideration is that the finding was supported by sufficient evidence in the record so as to enable the Master to arrive at the most precise estimates possible. Explo has not shown how clear error was committed by using other available data to make these calculations; see: Arrow Distilleries v. Arrow Distilleries, 117 F.2d 636, 638-639 (7th Cir. 1941), nor has it indicated that the only possible way to arrive at this finding would have been by the use of cross-section measurement. Its contention that the Master should not have awarded any damages because Garlam did not comply with the contractual provision of the cross-section measurement would have required a finding of contractual liability and not an assessment of damages. This limitation would have also

entailed the imposition of a higher burden of proof on Garlam; see: NLRB v. Blevins Popcorn Co., 659 F.2d 1173, 1186 (D.C. Cir. 1981). This was clearly not the Master's function.

Garlam's numerous objections to the Report can be classified as falling in either one of these categories: the technical basis used is incorrect; the Master did not consider certain evidence on record; the Master went beyond the limits of his assigned duties (i.e. the order of reference and Judge Bootle's opinion), and the Master accepted inadmissible evidence. Garlam, however, has not cited authorities that would support its proposition that the Master cannot rely on some of the evidence and disregard other. In fact, the cases seem to point to the opposite direction, specially when the evidence is presented

through conflicting live testimony and matters of credibility are involved; see: Tilghman v. Proctor, 125 U.S. 136, 149-150 (1888); Costello v. Fazio, 256 F.2d 903 (9th Cir. 1958); O'Hara v. Murphy, 137 F.2d 154 (1st Cir. 1943) cert. denied. We find that there was no "clear error" in the Special Master's conclusions or in his decision to rely more strongly on some evidence than on other. His reliance on certain technical information and not on the one to the liking of Garlam is not a clearly erroneous conduct. It is merely a matter of deciding which of the conflicting experts is the most reliable. This, by itself, is nothing more than part of the balancing process the Special Master had to do, and, unless his decision to rely on certain expert or technical information is shown to be clearly erroneous, this

court, in its reviewing function, must accept it as correct. Otherwise, there would be no purpose in appointing a special master. In this particular case, where Special Master Barros was appointed because the parties wanted someone with the adequate expertise to deal with the difficult technical and accounting questions that the determination entailed,11/ Garlam must come forward with something more than its allegations of what were the proper engineering standards and definitions that the Master should have considered. The Special Master did not have to rely on certain evidence, a certain expert or on a certain treatise, unless it is shown that by not doing so his findings were clearly erroneous. This has not been shown and there is no

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11/ See Order of Reference, September 12, 1979.

reason to reject the findings of the Special Master because he relied on the technical evidence which he determined was most appropriate and trustworthy.

The parameters of the Special Master's findings are found in the Order of Reference. This order, in turn, referred the Special Master to the findings contained in Judge Bootle's opinion. Garlam contends that the Special Master ignored the findings of liability made by Judge Bootle, while Explo contends that, contrary to the Opinion, the Master's detailed findings reveal that the amount owed to Explo was not insubstantial and, therefore, justified its abandonment of the project. Explo contends that, in view of the information revealed by the Master's Report, the Opinion cannot stand. Both parties are relying on erro-

neous interpretations of Judge Bootle's Opinion.

In the first place, Explo's reliance on isolated parts of the Opinion to justify its perception of the holding detracts from its proper understanding, something which can only be attained by examining the opinion in its entirety. This partial examination of the liability decision overlooks the fact that Explo did not render a satisfactory performance during the few months of its involvement in the project. Its liability, therefore, was not premised solely on the act of abandoning the project but it also comprised its inadequate performance. This inadequate performance is revealed by the Master's finding of the small amount of rock blasted and ripped by Explo in four months of operations and in finding that Explo was liable for some of

the extra cost. Such faulty performance, coupled with its mid-project abandonment, resulted in the adverse finding of liability against plaintiff. It is also important to recognize as did Judge Bootle, that this contract involved an interplay of many entities and factors, each depending on the other for the fulfillment of their obligations. The payment provisions were in no way a simple buy-sell transaction whereby the simultaneous performances would clearly manifest the certainty of each reciprocal obligation. The payment to Explo depended on the PRHA's certification and payment to Garlam and these payment provisions also required that the work performed comply with many technical requirements before payment was certified. Judge Bootle's estimate of the amount owed was not far from the mark

since $40,000.00 is in effect a very insignificant sum compared to the original stipulated price for the complete work ($1,200,000.00). In short, Judge Bootle found that in view of the payment provisions of the contract with PRHA, the deficient work performed by Explo, the amounts owed to Garlam at the time of abandonment on November 3, 1971, and the original extension of the contract, Explo's abandonment of the project, leaving unfinished the major part of its work, was unjustified. He thus concluded "that the real reason for the abandonment of the project by Explo was not any breach or failure of performance on the part of Garlam but was Explo's decision to abandon what for it was proving to be an unprofitable contract." Opinion at p. 19. The exact amount owed to Explo was not indispensable to make such a finding,

for the Court, working with the estimates available at that time, could devise a reliable way to balance both parties' contractual performance and decide whether the conduct of each in light of the other party's action, was justified or not. Although as Explo contends, the Courts in Puerto Rico have recognized that the implied resolutory condition of a bilateral obligation under Article 1077 of the Civil Code, P.R. Laws Ann., Tit. 31 Sec. 3052,12/ can be exercised without recourse to the courts, see: Federal Land Bank v. Echeandia, 48 PRR 311 (1935) it is also true that when the exeptio non adimpleti contractus justification is questioned the courts must then

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12/ Article 1077 in its pertinent part states: "The right to rescind the obligations is considered as implied in mutual ones, in case one of the obligated persons does not comply with what is incumbent upon him."

determine if it has been applied in the proper context and in consonance with its requirements. See generally on the requirements of this exception: Guaroa Velazques, Las Obligaciones Segun el Derecho Puertorriqueno, pp. 75-81 (1968 Ed.); 1 E. Vazquez Bote, Derecho Civil de Puerto Rico, Tomo III, pp. 140-144 (1973 Ed.); II, J. Puig Brutau, Fundamentos de Derecho Civil, Derecho General de las Obligaciones, Tomo I, pp. 152-164 (1959 Ed.). The Supreme Court of Puerto Rico in Velez v. Rios, 76 PRR 806 (1954), cited Spanish civil law commentator Manresa on Spain's equivalent article who states that: " '[T]he action for resolution of contract requires an actual and adequate breach which generally is not equivalent to a mere delay in payment . . . .' " Id. at 812. And the Supreme Court of Spain, when interpreting this

article, has indicated that not all forms of nonperformance or breach bring the exception into play. The breach must be definite and complete. See: Judgment of July 8, 1959, Tribunal Supremo Espanol. The exception contained in the Article should not be interpreted to apply automatically to any minor infringement but requires rather a rational and logical application to the circumstances to determine if these called for resolution. See: Judgment of January 5, 1953, Tribunal Supremo Espanol. This was precisely what Judge Bootle determined. Upon analyzing the contractual terms and the circumstances of this particular case, he found that Explo's abandonment was not justified by the alleged nonpayment and that it was not entitled to benefit from the provisions of Article 1077. We see no reason to disturb such a finding since

it is not only supported by the general principles of civil law discussed but does not contradict the Master's essential findings.13/

There are also no equitable reasons to set aside the Opinion and begin anew this ten year old case simply because Judge Bootle had the foresight of indicating that Explo would be credited with whatever amount Garlam owed to it for the blasting performed until abandonment. In this manner, Garlam was not left unaccountable for its nonpayment.

13/ Explo argues that Judge Bootle's opinion and judgment on the issue of liability is a provisional order that may be modified by the court and cites Haverhill Gazette Company v. Union Leader Corporation, 333 F.2d 798 (1st Cir. 1964). Since we have determined that the Report can be reconciled with the Opinion, the special circumstances of Haverhill, id. at 803, are not present in this case.

There are, however, reasons which move us to modify the court's previous ruling imposing the totality of the Special Master's fees and expenses on Explo.[14] Explo has requested modification of this order alleging that the reduction of Garlam's damages by almost three million dollars demonstrates that Garlam exaggerated its damages, thus justifying Explo's challenge to these sums and the resulting litigation on that issue. Garlam contends that Explo was obstinate because it consciously delayed the proceedings to its advantage. We would rather not pin the blame for the delay in this case on the failure of Congress to recognize the needs of liti-

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[14] These amount to $55,457.30 (969 hours at $55 per hour); see Motion-Statement of Costs and Expenses filed by the Special Master on June 11, 1980. The amount has not been contested by any of the parties.

gants, as Explo so aptly phrased it, for the reasons that turned this case into a ten year almost endless collection of legal and technical data are not found in a single cause. This delay was brought about by a complicated set of factors, that included not only the problems of modern judicial administration but also the parties' litigation strategy and the technical nature of the matters in controversy. The new light cast by the Master's findings on the real damages suffered convinces us that Explo was not obstinate in its defense of the case. The amount owed was certainly contested and was so indefinite that its determination required the appointment of a special master. There are reasons that can be ascribed to both parties' conduct which also account for the delay. Other circumstances, besides Explo's breach,

contributed to the difficulty in ascertaining the issues. For example, we believe the Master's task could have perhaps been made easier if Garlam had conducted the cross-section field measurements. Both parties, being in many ways equally responsible for the difficulties encountered in this case and the claims being immersed in such complexity and uncertainty, we consider that fairness dictates that the costs incurred by Special Master Ulises Barros be borne by both in equal proportion. Thus, in view of the new information provided by the Report and considering the discretion granted to the Court on this matter, see: Rule 53(a) Fed. R. Civ. P.; Morgan v. Kerrigan, 530 F.2d 401, 427 (1st Cir. 1976); Marks v. Polaroid Corp., 237 F. Supp. 425-426 (D. Mass. 1964); E.I. Du Pont de Nemours & Co. v. Purofied Down,

Etc., 176 F. Supp. 688, 701 (S.D.N.Y. 1959), we now ORDER that the costs of the Special Master be paid by Explo and Garlam in equal proportion. For these same reasons,15/ we conclude that Explo has not conducted the litigation in an obstinate manner and that imposition of prejudgment interest, cost and attorney's fees is not justified. Accordingly, Garlam's request that prejudgment interest, cost and attorney's fees be awarded to it from September 30, 1976 at 1.5 points over the New York Prime Rate if DENIED.

15/ The Master's findings prove that Explo's claim was not frivolous unless one can consider the defense of almost three million dollars of liability as obstinate litigation. The damages were certainly not uncontested and there was no indication of any misuse of legal procedures to delay the case. See: Ferrer Delgado v. Sylvia de Jesus, 440 F. Supp. 979, 982 (DPR 1976).

Garlam's contention that the Special Master went beyond the bounds of the Order of Reference is also founded upon improper and out of context interpretations of the Opinion. Garlam is under the mistaken impression that the fixing of liability upon Explo entailed imposing on this party whatever other extra costs that Garlam incurred in completing the project. This ignores the Master's finding that there were other reasons, unrelated to Explo's breach, which resulted in additional and unanticipated expenses. The difficult task of separating which extra costs were related to Explo's breach was meticulously performed by the Special Master in consonance with the Opinion and the Order of Reference. For instance, Garlam objects to his finding that the equipment bought by it are not damages resulting from Explo's

breach for this equipment was not acquired to remedy Explo's misperformance but rather so that Garlam could speed up the project and benefit from the bonus provisions for early termination in the contract with PRHA. Garlam argues that Judge Bootle had already determined this matter in its favor. There is, however, no such determination in the Opinion. At page 7 of the Opinion on liability it is said: "Some questions have been raised by Explo as to the sufficiency and propriety of the equipment of Garlam but the evidence fails to show the truth of the allegations or the relevancy of the allegations concerning the issues before the court in this first trial." This matter dealt with Explo's allegations that it abandoned the project because Garlam did not provide proper equipment. The court did not consider the allegations con-

cerning the investment in new equipment as relevant to that part of the case. These were left for the Master's determination in the second stage of the case, as they were in fact determined.16/ Nothing in the court's decision on liability indicates that the cost of this item was to be attributed to Explo.

Finally, Garlam makes a general reference to the use of depositions in support of the Special Master's findings and urges that the report be rejected because it disregarded Rule 32, Fed. R. Civ. P. does not object to the admissibility of the depositions under Rule

---

16/ Contrary to Explo's contention the Master did not determine that Explo did not have proper equipment and that for this reason it abandoned the project. Judge Bootle's finding on this matter was left untouched for the Master's findings were to determine if the new equipment was bought by Garlam as a result of Explo's breach.

32(b) or to their use in substitution of live testimony pursuant to Rule 32(a)(3). Nor has it requested that other parts of a deposition offered only partially be introduced.

In its customary diffuse manner of argumentation, Garlam requests that we reject the report and appoint a new master because it found mathematical errors in the report. It claims that the report is "plagued" with such type of errors yet mentions only one. The others, raised in its objections to the preliminary report, were corrected by the master as clerical errors and the remaining one, the result of Garlam's own submitted data, had no significant effect on the overall computations. Although some of these errors are clearly apparent from the record, their impact on the findings has not been shown by Garlam. Garlam has not shown

what precise findings must be rejected as tainted because the Master relied solely on the mathematical mistake or on inadmissible depositions. In the case of the depositions, the lack of specificity makes Garlam's undefined objection even weaker for there were many depositions considered by the master which were admissible under Rule 32 Fed. R. Civ. P.; for example, those of corporation officers, government agency representatives, or simply for impeachment purposes, some of which were filed by Garlam itself. There are no findings in the report based solely on a deposition for its support. There are no indications, by Garlam or otherwise, of irregularities in the taking of the depositions or of grounds which would make them inadmissible.

In sum, neither Garlam nor Explo have demonstrated clearly erroneous findings

which would require that we reject the Master's conclusions. We are aware that the report is not without imperfection. The flaws, however, are not substantial. They are a speck in the immense task of compiling and analyzing the technical data involved in this case and making findings which are supported by the evidence and by rational and reasonable inferences derived therefrom; see: Socony-Vacuum Oil Co. v. Oil City Refiners, 136 F.2d 470, 473 (6th Cir. 1943) cert. denied 320 US 798. Perhaps the issues of liability and damages in this case were so intertwined that the decision to sever was not the one most indicated. See: Haverhill Gazette Co. v. Union Leader Corp., 333 F.2d 798, 804, n. 10 (1st Cir. 1964). Yet only from the comfortable security that hindsight provides can we arrive at this conclusion.

At the moment the decision was made, the parties acquiesced and believed that this was the proper path to tread. They also accepted the appointment of a special master without any objections whatsoever. Garlam's insinuation that they were somehow forced into it is frivolous. At this stage in the proceedings, the validity of the appointment and qualifications of the master never having been questioned before, our task in examining his report is limited to examining the record for clear error. Such "clear errors" have not been shown and an exhaustive examination of the entire record has failed to reveal any. The findings of the Special Master are, therefore, adopted as the findings of this Court on the issue of damages.

SO ORDERED

At San Juan, Puerto Rico, on November 16, 1982.

CARMEN CONSUELO CEREZO
United States District Judge

72518

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

EXPLOSIVES CORPORATION OF AMERICA,	)	
Plaintiff	)	
vs	)	CIVIL 72-0001CC
GARLAM ENTERPRISES CORPORATION & FEDERAL INSURANCE COMPANY	)	
Defendants	)	

JUDGMENT

Having considered the decision of Judge Bootle on the issue of liability entered on April 4, 1976 and our opinion and order of November 10, 1982 adopting the findings of the Special Master on the issue of damages, Judgment is hereby entered in favor of defendant counter-claimant, Garlam Enterprises Corporation and against plaintiff Explosives Corporation of America and its surety

General Insurance of America[1] in the total sum of $2,423,177.00. The motions for pre-judgment interest, costs and attorney's fees filed by Garlam Enterprises Corporation are DENIED.

The Special Master's fees which amount to $55,457.80 shall be paid by Explosives Corporation of America and by Garlam Enterprise Corporation in equal proportions.

SO ORDERED AND ADJUDGED.

At San Juan, Puerto Rico, on November 16, 1982.

CARMEN CONSUELO CEREZO
United States District Judge

72736

---

[1]The liability of General Insurance of America is limited to the sum of $1,230,000.00 fixed in the payment and performance bond.

This Petition involves the following statutory provisions:

28U.S.C. §1961(a): Interest

"(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges..."

Rule 36, Fed. R. App. P.; Entry of Judgment

"The notation of a judgment in the docket constitutes entry of the judgment. The clerk shall prepare, sign and enter the judgment following receipt of the opinion of the court unless the opinion directs settlement of the form of the judgment, in which event the clerk shall prepare, sign and enter the judgment following final settlement by the court. If a judgment is rendered without an opinion, the clerk shall prepare, sign and enter the judgment following instruction from the court. The clerk shall, on the date judgment is entered, mail to all parties a copy of the opinion, if any, or of the judgment if no opinion was written, and notice of the date of entry of the judgment."

Rule 37, Fed. R. App. P.; Interests on Judgment

"Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is

allowed by law shall be payable from the date the judgment was entered in the district court. If a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest."

Rule 54, Fed. R. Civ. P.; Judgment; Costs

"**(a) Definition; Form.** "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the

party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.

(d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court."

Rule 58, Fed. R. Civ. P.: Entry of Judgment

"Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course."

Rule 62(b), Fed. R. Civ. P.: Stay of Proceedings To Enforce a Judgment.

"

. . .

(b) Stay on Motion for New Trial or for Judgment. In its discretion and on such conditions for

the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b)..."

Rule 77(d), Fed. R. Civ. P.; District Courts and Clerks

"...

(d) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure."

Rule 79(a), Fed. R. Civ. P.; Books and Records Kept by the Clerk and Entries Therein

"**(a) Civil Docket.** The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made appli-

cable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action. . ."

No. 87-332

Supreme Court, U.S.
FILED
SEP 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1987

GARLAM ENTERPRISES CORPORATION,
Petitioner,

v.

EXPLOSIVES CORPORATION OF AMERICA,
ROCKCOR, INC., and
GENERAL INSURANCE COMPANY OF AMERICA,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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September 25, 1987

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QUESTIONS PRESENTED

1. Does the conflict between several circuit courts of appeal as to the date from which interest should run in the case of reinstatement by the appellate court of a verdict and judgment based thereupon, following its reversal of a district court's grant of judgment n.o.v., justify review by certiorari in this case where there was no jury verdict or judgment n.o.v., but where prolongation of the case after the district court's quantification of damages instead resulted from plaintiff Garlam's own post "judgment" claims against a third party, and when Garlam never sought a Fed. R. Civ. P. 54(b) order of finality?

2. Does allowance of interest on Garlam's judgment in this diversity action, in accordance with 28 U.S.C. § 1961, conflict with either *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941) or *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)?

3. Does the district court's exercise of discretion both against awarding attorney's fees under a contract provision allowing for their recovery, and against an award of pre-judgment interest and attorney's fees under Puerto Rico law, involve an impermissible impairment of contract or represent a departure from the accepted and usual course of judicial proceedings?

LIST OF PARTIES

Petitioners identify Explosives Corporation of America ("Explo"), General Insurance Company of America ("GICA"), and Rockcor, Inc. ("Rockcor"), as respondents. Pursuant to Supreme Court Rule 28.1, we advise that Safeco Corporation wholly owns General Insurance Company of America. Olin Corporation wholly owns Rockcor, Inc. Explosives Corporation of America has been dissolved in accordance with Washington law, and its claim against Garlam Enterprises Corporation ("Garlam") in this litigation was assigned to Rockcor.

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IN THE

Supreme Court of the United States

October Term, 1987

GARLAM ENTERPRISES CORPORATION,
Petitioner,

v.

EXPLOSIVES CORPORATION OF AMERICA,
ROCKCOR, INC., and
GENERAL INSURANCE COMPANY OF AMERICA,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Garlam's listing of the opinions below is incomplete without reference to the Memorandum Opinion and Order of the district court dated November 16, 1982, a copy of which is reproduced in respondents' appendix (R.A.) hereto. R.A. 1-27.

STATUTORY PROVISIONS AND COURT RULES INVOLVED

The following supplements the list of statutes and rules commencing at 167a of the petition.

28 U.S.C. § 1961 (this is the text of the statute *prior* to the 1982 amendment [prior to 1948, the predecessor statute of 28 U.S.C. § 1961 was codified at 28 U.S.C. § 811]):

Interest

Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of entry of the judgment, at the rate allowed by State law.

(June 25, 1948, c. 646, 62 Stat. 957.)

Rule 25(c), Fed. R. Civ. P.:

Rule 25. Substition of Parties

(c) Transfer of Interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

Rule 54(a), Fed. R. Civ. P.:

Rule 54. Judgments, Costs

(a) *Definition; Form.* "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

Rule 58, Fed. R. Civ. P.:

Entry of Judgment

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court

that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

Rule 79(a), Fed. R. Civ. P.:

Rule 79. Books and Records Kept by the Clerk and Entries Therein

(a) **Civil Docket.** The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order of judgment of the court and of the returns showing execution of process. The

entry of an order of judgment shall show the date the entry is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.

Puerto Rico Rule of Civil Procedure 44.1(d):

> Attorney's fees. Where a party has been obstinate, the court shall in its judgment impose on such person the payment of a sum for attorney's fees.

Puerto Rico Rule of Civil Procedure 44.3:

> **44.3 Legal Interest**
>
> (a) Every judgment ordering the payment of money shall include legal interest to be computed on the amount of the judgment from the date it was entered up to the time of satisfaction thereof, without including costs and attorney's fees.
>
> (b) Except when the defendant is the Commonwealth of Puerto Rico, its municipalities, agencies, instrumentalities or officers acting in their official capacity, the court may impose on an obstinate party the payment of legal interest to be computed on the amount of the judgment from the time the cause of action accrues in actions of debt, and in actions for damages, from the time the complaint is filed until judgment is entered. The provisions of this paragraph shall be applicable to the causes of action filed after May 26, 1967.

STATEMENT OF THE CASE

With respect to the central issue of Garlam's petition as to when interest should commence accruing on its judgment amount, respondents adopt and incorporate by reference the procedural history summary found in the First Circuit's April 30, 1987 Opinion at 34a-38a ("a" references petitioner's appendix). Respondents here only highlight some critical procedural matters and incomplete statements by Garlam.

Garlam emphasizes that on November 16, 1982, the district court executed and filed a separate document denominated "Judgment"[1] (165a) purportedly in compliance with Fed. R. Civ. P. 58. That judgment was in favor of Garlam and against Explo in the amount of $2,423,177.00, and against GICA for $1,230,000. Garlam neglects, however, to report that also on November 16, 1982, the district court executed and filed a "Memorandum Opinion and Order" (which is missing from Garlam's appendix, but attached hereto at R.A. 1-27).

That Memorandum Opinion and Order addressed Garlam's motion to reconsider the district court's prior dismissal of Garlam's amended complaint joining Rockcor as an additional party defendant. R.A. 3-10, 24. The district court denied reconsideration and instead authorized Garlam to file a motion pursuant to Fed. R. Civ. P. 25(c) for substitution of Rockcor as judgment debtor. R.A. 10, 26. In so doing, the district court forewarned Garlam its pursuit of a new claim against Rockcor would prolong the litigation:

> We are painfully aware that the end result of this ruling may well be an additional dilation of this ten year old case, yet to leave the matter as it stands is a blow to fairness and by doing so we would be inviting more delay and appeals.

(Footnote omitted; R.A. 26.)

---

[1] Garlam's Table of Contents at p. V of its petition incorrectly states the judgment date as November 16, 1986. It also there incorrectly states the date of the district court's November 16, 1982 "Opinion and Order" as November 16, 1986.

In order to eliminate any confusion, we note that on November 16, 1982, the district court executed three documents: (1) a "Judgment" (found at 165a-166a); (2) an "Opinion and Order" (found at 116a-164a) explaining the basis of its adoption of the Special Master's findings as to the amount of damages; and (3) a "Memorandum Opinion and Order" (found in respondents' appendix at R.A. 1-27) concerning the substitution issue.

Garlam nevertheless filed its substitution motion on December 15, 1982. R.A. 28-31. Meanwhile, Explo appealed the district court's November 16, 1982 "Judgment." A ground upon which Garlam in April 1983 successfully argued for dismissal thereof to the First Circuit is most relevant to its present petition. Garlam stated that:

> The judgment entered by the court below is not a final decision *since the judgment appealed does not contain the certification required under Rule 54(b), F. R. Civ. P., in that there are claims which affect the rights of the parties pending resolution by the court below.*
>
> Therefore, this court lacks appellate jurisdiction since a final order has not been entered. *See Coulter v. Sears Roebuck & Company*, (5th Cir-1969) 411 F.2 1189; *A.O. Smith Corporation-vs-Simms Consolidated Ltd.* (10th Cir-1981) 647 F.2 118.

(Emphasis added, footnote omitted; R.A. 33-34.)

With respect to the issues raised in Garlam's petition concerning the lack of any award to it of attorneys' fees or prejudgment interest, the district court's November 16, 1982 Opinion and Order (116a-164a) made several relevant findings (particularly at 153a-156a). The district court noted that the Special Master had reduced Garlam's claimed damages by "almost three million dollars" (153a) and that "the master's task could have perhaps been made easier if Garlam had conducted the cross-section field measurements" (155a) as required under the parties' subcontract. The court also referred to Garlam's "customary diffuse manner of argumentation" (160a) and noted Garlam's "repeated efforts to cloak its relationship with PRHA and its pending claims" (127a) in related litigation in the Puerto Rico Superior Court.

Most significantly, the district court expressly found (at 156a):

> For these same reasons,[15] we conclude that Explo has not conducted the litigation in an obstinate manner and that imposition of prejudgment interest, cost and attorney's fees is not justified.

Note 15: The Master's findings prove that Explo's claim was not frivolous unless one can consider the defense of almost three million dollars of liability as obstinate litigation. The damages were certainly not uncontested and there was no indication of any misuse of legal procedures to delay the case. *See Ferrer Delgado v. Sylvia de Jesus*, 440 F. Supp. 979, 982 (DPR 1976).

As developed *infra*, these findings are fatal to Garlam's claim under Puerto Rico law.

RELATED PETITION

Respondents argue below that Garlam's petition for certiorari should be denied. Nevertheless, respondents believe that certiorari is appropriate with respect to issues raised in their previously filed petition in Supreme Court No. 87-204.

SUMMARY OF ARGUMENT

1. The Conflict Between Circuits Concerning Application of 28 U.S.C. § 1961 in the Context of Reversal of n.o.v. Judgments, Is Inapposite to This Case Which Instead Involved an Unresolved Third Party Claim.

Garlam argues that there is a conflict between several circuit courts of appeal as to the date from which interest should accrue under 28 U.S.C. § 1961, when post-judgment motions are made. This conflict is narrower than suggested by Garlam, and — most importantly — is inapposite to the facts of this case.

Specifically, several circuit courts differ as to when interest should begin accruing, after an appellate court has reinstated a jury verdict and judgment based thereupon following its reversal of a district court grant of a judgment n.o.v. Some courts think interest should run from the date of the original verdict, others from the date of the appellate court mandate, and one favors a case by case approach.

In this case, however, there was no jury, nor any judgment n.o.v. Instead, following the initial trial court entry of "judgment" against Explo, Garlam itself injected into the litigation a claim against Rockcor seeking to substitute it as judgment debtor. Moreover, it did so without making any request to the trial court for a Fed. R. Civ. P. 54(b) certification of finality. Under these circumstances, as even cases relied upon by Garlam recognize, judgment was not properly entered under Fed. R. Civ. P. 58, nor would interest begin accruing, until resolution of the third party claim against Rockcor.

2. **28 U.S.C. § 1961, Which Provides for Post-Judgment Interest in All Federal (Including Diversity) Cases at a Rate Tied to the Price of Treasury Bills, Has Been Held to be Constitutional Under the Doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), Because the Matter of Post-Judgment Interest is Rationally Capable of Classification as Procedural.**

3. **In Enforcing a Contract Providing for an Award of Attorneys' Fees, and in Assessing Prejudgment Interest or Attorneys' Fees Under Puerto Rico Law, the Court May Deny an Award in Its Sound Discretion.**

ARGUMENT

I. Review by Certiorari Is Not Justified With Respect to the First Circuit Court of Appeals' Application of 28 U.S.C. § 1961, Because No Final Judgment Was Entered Until March 6, 1986, As a Result of Garlam's Own Raising of Claims Against an Additional Party, and the Conflict Between the Circuit Courts of Appeal Relied Upon By Garlam Is Inapposite to the Facts of This Case.

A. There Was No Final Judgment Until March 6, 1986, Because the "Judgment" Entered on November 16, 1982, Left Unadjudicated Garlam's Claim Against Rockcor, Inc., and There Was No Certification of Finality Under Fed. R. Civ. P. 54(b).

Garlam's first question presented at page I of its petition, as well as its supporting argument, assert and assume that the district court's "judgment" of November 16, 1982 (165a-166a) was entered "pursuant to rules 58 and 79(a), Fed. R. Civ. P." Garlam's argument fails precisely because the November 16, 1982 judgment was demonstrably not effectively entered pursuant to Fed. R. Civ. P. 58. The First Circuit Court of Appeals' Opinion pertinently states (at 38a-39a):

> "Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the *date of the entry of the judgment.*" 28 U.S.C. § 1961 (Supp. 1987) (emphasis added [by the First Circuit]).
>
> A judgment "includes a decree and any order from which an appeal lies." Fed. R. Civ. P. 54(a). It is clear from this court's prior dimissals that the November 1982 judgment was not final because other issues remained to be resolved.
>
> The district court never made a Rule 54(b) determination as to the November 1982, judgment nor did Garlam

> ask for one. Moreover, the district court's order of August 8, 1985 — allowing the proceedings to continue in that court despite a pending notice of appeal — suggests that the judgment of November 16, 1982, was not intended to be final.

As developed above in the Statement of the Case, the district court contemporaneously with its November 16, 1982 "Judgment" entered a "Memorandum Opinion and Order" (R.A. 1-27) authorizing Garlam to file a Fed. R. Civ. P. 25(c) motion to substitute Rockcor as judgment debtor for Explo, commenting that "the end result of this ruling may well be an additional dilation of this ten year old case, . . ." R.A. 26.

As Garlam itself pointed out to the First Circuit Court of Appeals in April of 1983, in successfully arguing for a dismissal of Explo's appeal from the November 16, 1982 judgment:

> the judgment entered by the court below is not a "final decision" since the judgment appealed does not contain the certification required under Rule 54(b), F.R.Civ.P., *in that there are claims which affect the rights of the parties pending resolution by the court below.*

(Emphasis added, R. A. 33.)

Garlam was exactly right. Then, and now, Fed. R. Civ. P. 54(b) pertinently provides:

> In the absence of such determination and direction, an order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Because Fed. R. Civ. P. 58 is expressly "subject to the provisions of Rule 54(b)", and because there was no Rule 54(b) order of finality, there was no judgment effectively entered "pursuant to Rule 58", notwithstanding Garlam's repeated assertions.[2] Moreover, as will be developed *infra*, several cases relied on by Garlam support this same analysis, and none are inconsistent with the result appealed from by Garlam.

B. The Conflict Between the Circuit Courts of Appeal Relied Upon by Garlam Involves When Interest Should Commence Accruing When There Has Been a Reinstatement of a Jury Verdict and Judgment Based Thereupon, After Reversal of a Trial Court n.o.v. Judgment, But Such Conflict Is Inapposite to this Case Where There Was No Jury, or Judgment n.o.v., and Where Instead a Prolongation of the Litigation Resulted From Garlam's Additional Claim Therein Against Rockcor.

Garlam's argument at pages 10-17 of its petition that a conflict among circuit courts of appeal justifies certiorari, cites nine cases which evidence the conflict. Six of those cases[3] arise

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[2] "Until and unless the court does so [makes a Rule 54(b) certification], as the courts in *Caputo* [*v. United States Lines Co.*, 311 F.2d 413 (2d Cir. 1963), *cert. denied sub nom. Imparato Stevedoring Corp. v. United States Lines Co.*, 374 U.S. 833 (1963)] and *Howell* [*v. Sinclair Refining Co.*, 20 F.R.D. 623 (N.D. Ala. 1957)] emphasized, the clerk has no authority to enter judgment, for Rule 58 is expressly made subject to the provisions of Rule 54(b)." *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 846 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979).

[3] *Powers v. New York Central Railroad Co.*, 251 F.2d 813 (2d Cir. 1958); *Turner v. Japan Lines, Ltd.*, 702 F.2d 752 (9th Cir. 1983); *Buck v. Burton*, 768 F.2d 285 (8th Cir. 1985); *Affiliated Capital Corp. v. City of Houston*, 793 F.2d 706 (5th Cir. 1986); *Louisiana & Arkansas Ry. Co. v. Pratt*, 142 F.2d 847 (5th Cir. 1944); *Briggs v. Pennsylvania Railroad Co.*, 334 U.S. 304 (1947).

judgment notwithstanding the verdict, and the subsequent reinstatement of the jury verdict and judgment thereupon by the appellate court. Some of those cases hold that interest should run from the date of the original jury verdicts;[4] others hold that interest should run from the date of appellate court mandate;[5] one holds that a case by case analysis is appropriate;[6] and one found it unnecessary to address the issue.[7]

While it may one day be appropriate for this Court to address and resolve that conflict, we respectfully submit that it should wait for a case which facts turn upon and illustrate that conflict, which the present case plainly does not. The distinguishing element of the present case is highlighted by the other three cases discussed by Garlam, *Caputo v. United States Lines, Co.*, 311 F.2d 413 (2d Cir. 1963), *cert. denied sub nom. Imparato Stevedoring Co. v. United States Lines Co.*, 374 U.S. 833 (1963), *Hooks v. Washington Sheraton Corp.*, 642 F.2d 614 (D.C. Cir. 1980), and *Ohio-Sealy Mattress Mfg. Co., v. Sealy, Inc.*, 585 F.2d 821 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979). As now developed, those cases teach that the pendency of unresolved third party claims, such as are involved here, combined with the absence of a Fed. R. Civ. P. 54(b) certification, precludes accrual of interest prior to entry of a final judgment.

In *Caputo*, a clerk's form of judgment was entered on November 6, 1961 based upon the jury's verdict. However, at that time there had been no determination of a third party claim by the court. It was not until March 20, 1962 that final judgment was entered. The Second Circuit held that the pendency of unresolved third party claims precluded accrual of interest from the earlier judgment, because of the absence

[4] *Turner, supra; Buck, supra; Louisiana & Arkansas Ry. Co., supra.*

[5] *Powers, supra.*

[6] *Affiliated, supra.*

[7] *Briggs, supra*, 344 U.S. at 307.

of a Rule 54(b) certification. 311 F.2d at 416-417. Similarly, in *Hooks*, *supra*, the District of Columbia Circuit held that a May 27, 1975 clerk-entered judgment upon a jury verdict could not accrue interest when no finality order was entered under Rule 54(b) and a claim by the judgment debtor over against a third party remained unadjudicated. 642 F.2d at 617.

Finally, *Ohio-Sealy*, *supra*, involved the question as to whether interest should accrue on a judgment for damages based upon a jury verdict in favor of a licensee against its licensor, when there remained pending for adjudication the licensee's request for equitable relief against the licensor. The Seventh Circuit concluded that interest should accrue from the earlier date of jury verdict and judgment, prior to resolution of the equitable claim, because there were no separate claims within the meaning of Rule 54(b), "but merely one claim for two types of relief." 585 F.2d at 846.

Significantly, however, the court did approve the result in *Caputo*, *supra*, which had denied interest until resolution of a third party claim, in the absence of a Rule 54(b) certification of finality. The *Ohio-Sealy* court recognized that when there are separate claims (or, as must also be noted, claims against third parties, as in this case) which are unresolved, then no judgment which will bear interest can be entered barring a Rule 54(b) order. The Seventh Circuit stated at 585 F.2d 846:

> Until and unless the court does so [makes a Rule 54(b) certification] as the courts in *Caputo* and *Howell* [v. Sinclair Refining Co., 20 F.R.D. 623 (N.D. Ala. 1957)] emphasized, the clerk has no authority to enter judgment, for Rule 58 is expressly made subject to the provisions of Rule 54(b).

In summary, the conflict discussed by Garlam is inapposite to this case. Garlam's discussion distorts the true

judgment motions for relief" category, without addressing the vital distinction between judgment n.o.v. cases, and those involving unresolved claims against third parties. While there is a conflict between the judgment n.o.v. cases, those involving unresolved third party claims unanimously deny interest in the absence of a Rule 54(b) finality order. Moreover, as the Seventh Circuit's discussion in *Ohio-Sealy*, *supra*, makes clear, even those cases allowing interest in the n.o.v. cases from the date of the original verdict, do not support the result here urged by Garlam. Indeed, the *Ohio-Sealy* court expressly approved the result in *Caputo*, *supra*, relied upon by the First Circuit in denying interest until the resolution of the third party claim against Rockcor.

II. The Circuit Court of Appeals Properly Awarded Interest in Accordance with 28 U.S.C. § 1961, and Neither *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941), Nor *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), Require a Contrary Result.

Garlam's petition asserts at page 18 that the Court of Appeals opinion directly conflicts with *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941). It argues that *Klaxon*,[8] *supra*, and *New Amsterdam Casualty Co. v. Soileau*, 167 F.2d

[8] *Klaxon* held that in a diversity case, a district court was bound under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), to apply the conflict of law rules of the state in which it sat. Consequently, the Delaware district court's "independent determination" (313 U.S. 496) as to what law governed the matter of prejudgment interest, was reversed and remanded for a decision based on Delaware law. The court noted that this accorded with the provision in 28 U.S.C. § 811, the predecessor statute to 28 U.S.C. § 1961, that the post-judgment interest rate was per the statute determined according to state law. 313 U.S. 497. As noted in *Weitz Company, Inc. v. Mo-Kan Carpet, Inc.*, 723 F.2d 1382, 1385-86 (8th Cir. 1983), 28 U.S.C. § 1961 was amended in 1982 to tie the post-judgment interest rate to the price of Treasury bills.

767, 772 (5th Cir. 1948), *cert. denied*, 335 U.S. 822 (1948), demonstrate that in diversity actions, interest is computed according to state law. Garlam then argues that Puerto Rico law allows for interest from the date of breach of contract (Garlam cites no Puerto Rico authority) and that such rule must be applied in this case under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

Respondents concede that state law governs the availability of prejudgment interest in diversity actions, and that Puerto Rico law allows therefor in certain exceptional cases. However, as developed under III below, the district court properly exercised discretion against an award. With respect to post-judgment interest, the sufficient answer is provided by *Weitz Company, Inc. v. Mo-Kan Carpet Inc.*, 723 F.2d 1382 (8th Cir. 1983), which specifically rejects Garlam's argument that state law governs under the *Erie* doctrine. Pertinent discussion upholding the application of 28 U.S.C. § 1961 in diversity cases is found at 723 F.2d 1385-1386:

> The final issue concerns the cross-appeal of Weitz. Weitz argues that, in this diversity suit, the district court erred in applying the federal interest statute rather than the Iowa interest statute. *We hold that federal law governs the award of post-judgment interest in this case while state law governs the award of prejudgment interest. The federal judgment interest statute was amended and became effective October 1, 1982.* Federal Courts Improvement Act of 1982, Pub.L. 97-164, § 302(a), 96 Stat. 25, 55-56 (codified at 28 U.S.C.A. § 1961(a) (Supp. 1983)). *Federal law now provides for interest from the date of judgment at a floating rate determined by the coupon yield of United State Treasury bills.* The provision covers "any judgment in a civil case recovered in a district court." *Id.* No exemption is made for actions based on diversity of citizenship. This court must apply an applicable federal provision over a conflicting state provision, unless the federal provision is found unconstitutional. *See Hanna*

> v. Plumer, 380 U.S. 460, 471, 85 S.Ct. 1136, 1144, 14 L.Ed.2d 8 (1965); U.S. Const. art. VI, Cl. 2. We believe that the new federal interest statute is constitutional and therefore governs the award of postjudgment interest in this case. *Accord Rose Hall, Ltd. v. Chase Manahattan Overseas Banking Corp.*, 566 F.Supp. 1558, 1574 n. 46 (D.Del. 1983); *Lake Tahoe Sailboat Sales & Charter, Inc. v. Douglas County*, 562 F.Supp. 523, 524 (D.Nev. 1983); *Interstate Fire & Casualty Co. v. Hartford Fire Insurance Co.*, 548 F.Supp. 1185, 1189 (E.D.Mich. 1982). We affirm this portion of the district court's order.
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> . . .
>
> The *Erie* doctrine does not require a different result. Even if the rate of interest that a judgment will bear is in some sense "substantive," in that it is a part of the damages recovered by the winning side, it is also easily susceptible of characterization as "procedural," since it has to do exclusively with events that occur after a dispute gets to court. The question of interest, therefore, is at most in "the uncertain area between substance and procedure," and "rationally capable of classification as either." *Hanna v. Plumer, supra*, 380 U.S. at 472, 85 S.Ct. at 1144. It is therefore a subject with respect to which Congress has full power to legislate, even as to cases that get into the federal courts only because of diversity of citizenship.

Accord, G.M. Brod & Co. v. U.S. Home Corp., 759 F.2d 1526, 1542 (11th Cir. 1985). We are aware of no conflicting authority.

As indicated in *Weitz, supra*, state law governs the award of prejudgment interest in diversity actions. Puerto Rico Civil Rule 44.3 does allow award of prejudgment interest (from the date of filing the complaint) against parties whose conduct of litigation is found to have been "obstinate." In our case, the district court expressly declined to authorize an award against Explo under Rule 44:

> The new light cast by the Master's findings on the real damages suffered convinces us that Explo was not obstinate in its defense of the case.

(154a.) As now developed, ample authority establishes the trial court's discretion to deny prejudgment interest or attorney's fees to Garlam.

III. The Trial Court's Exercise of Sound Discretion Against an Award of Attorney's Fees and Prejudgment Interest Does Not Unconstitutionally Impair a Contractual Obligation, or Depart From the Accepted and Usual Course of Judicial Proceedings.

Even when a written agreement provides for an award of attorney's fees in disputes between the parties, the trial court has discretion to decline such an award if it would be inequitable or unreasonable (as determined in this case). *See, e.g., Perry v. Stewart Title Company*, 756 F.2d 1197, 1211 (5th Cir. 1985), *reh'g granted in part and denied in part*, 761 F.2d 237 (1985); *Gregg v. U.S. Industries, Inc.*, 715 F.2d 1522, 1542 (11th Cir. 1983), *cert. denied*, 466 U.S. 960, 104 S.Ct. 2173, 80 L.Ed.2d 556 (1984); *Cable Marine, Inc. v. M/V Trust Me II*, 632 F.2d 1344, 1345 (5th Cir. 1980); *United States ex rel. DeBlasio Constr., Inc., v. Mountain States Construction Co.*, 588 F.2d 259, 263 (9th Cir. 1978).

The district court also had discretion to deny Garlam's requests for attorney's fees and prejudgment interest under Puerto Rico Civil Rule 44.1(d) or 44.3 (permitting such awards against parties whose conduct of litigation is found to be "obstinate"):

> The Puerto Rico Rule provides that such awards are left to the court's discretion, and that in the case of attorneys' fees and prejudgment interest, the judge must find that the party against whom such award is requested has been obstinate.

Heddinger v. Ashford Memorial Community Hospital, 734 F.2d 81, 86 (1st Cir. 1984). It has clearly been held that "[a]

determination of obstinacy must necessarily rest heavily on the discretion of the trial court."[9]

Based on the facts and procedural history of this case (as summarized earlier in this brief), the district court had ample justification for an exercise of discretion against award of attorney's fees and prejudgment interest. Obviously such an exercise is not an unconstitutional impairment of contractual obligation or a departure from the accepted course of judicial proceedings.

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[9] *Marston v. American Employers Insurance Company*, 439 F.2d 1035, 1042 (1st Cir. 1971); *see also, Paul N. Howard Company v. P.R. Aqueduct & Sewer Authority*, 110 F.R.D. 78, 83 (D. P.R. 1986) ("The matter of whether or not to award attorney fees for obstinacy is discretional"); *Felix v. Victory Carriers, Inc.*, 342 F.Supp. 1386, 1388 (D. Puerto Rico 1972). *See also Santiago Martinez v. Compagnie Generale Transatlantique*, 517 F.2d 371, 375 (1st Cir. 1975), *cert. denied sub nom. Fred Imbert, Inc. v. Compagnie Generale Transatlantique*, 423 U.S. 1048 (1976). The First Circuit has expressed concern about the "dangers" of over-applying Rule 44. *See, e.g., Carrillo v. Sameit Westbulk*, 514 F.2d 1214, 1219 (1st Cir. 1975), *cert. denied sub nom. Westbulk v. Caribe Shipping Co.*, 423 U.S. 1014 (1975) (vacating and remanding for the district court to provide "more explicit" findings to support an award of counsel fees). Where a case "presented close questions and sharp conflicts in the evidence on both liability and damages," the First Circuit reversed an award of attorneys' fees despite a trial court finding of "obvious temerity." *La Playa Santa Marina, Inc. v. Chris-Craft Corporation*, 597 F.2d 1, 7 (1st Cir. 1979).

CONCLUSION

Garlam's petition for certiorari should be denied. Respondents submit, however, that certiorari should be granted with respect to the issues raised in their petition for certiorari filed in Supreme Court number 87-204.

DATED this 25th day of September, 1987.

Respectfully submitted,

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[9] *Marston v. American Employers Insurance Company*, 439 F.2d 1035, 1042 (1st Cir. 1971); *see also, Paul N. Howard Company v. Puerto Rico Aqueduct & Sewer Authority*, 110 F.R.D. 78, 83 (D. Puerto Rico 1986) ("The matter of whether or not to award attorney fees for obstinacy is discretional"); *Felix v. Victory Carriers, Inc.*, 342 F.Supp. 1386, 1388 (D. P.R. 1972). *See also Santiago Martinez v. Compangnie Generale Transatlantique*, 517 F.2d 371, 375 (1st Cir. 1975), *cert. denied sub nom. Fred Imbert, Inc. v. Compagnie Generale Transatlantique*, 423 U.S. 1048 (1976). The First Circuit has expressed concern about the "dangers" of overapplying Rule 44. *See, e.g., Carillo v. Sameit Westbulk*, 514 F.2d 1214, 1219 (1st Cir. 1975), *cert. denied sub nom. Westbulk v. Caribe Shipping Co.*, 423 U.S. 1014 (1975) (vacating and remanding for the district court to provide "more explicit" findings to support an award of counsel fees). Where a case "presented close questions and sharp conflicts in the evidence on both liability and damages," the First Circuit reversed an award of attorneys' fees despite a trial court finding of "obvious temerity." *La Playa Santa Marina, Inc. v. Chris-Craft Corporation*, 597 F.2d 1, 7 (1st Cir. 1979).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

EXPLOSIVES CORPORATION OF AMERICA,	)	
Plaintiff	)	
vs	)	CIVIL 72-0001CC
GARLAM ENTERPRISES CORPORATION & FEDERAL INSURANCE COMPANY	)	
Defendants	)	

MEMORANDUM OPINION AND ORDER

On September 9, 1977 Garlam Enterprises Corporation, defendant and counterclaimant, filed a motion requesting substitution of parties under Rule 25(c), Fed. R. Civ. P. on the grounds that Explo had been dissolved in 1975 by merger with Excoa, Inc. which, in turn, was "liquidated or dissolved" into Rocket Research Corporation, now called Rockor, Inc. (Rocket). Movant stated that Excoa and Explo were both wholly-owned by Rocket and that the latter was

now paying the attorneys' fees for Explo in this case. Plaintiff opposed this contending that to bring Rocket at such a late stage of the proceeding and to hold it liable before having had its day in court would violate the due process clause of the Constitution. It also argued that Rocket had not been served in accordance with the requirements of Rule 25[1/] and cited Ransom v Brennan, 437 F.2d

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1/ Rule 25 Fed. R. Civ. P. in its pertinent part states:

(a) Death

(1) . . . The motion for substitution . . . together with the notice of hearing shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of summons and may be served in any judicial district. . . .

(2) . . . .

(b) . . . .

(See next page.)

513 (5th Cir. 1971) cert. denied 403 US 904, in support of the proposition that a Rule 5, Fed. R. Civ. P. service was not sufficient to invest the Court with personal jurisdiction over a substituted party. The request for substitution of parties was subsequently withdrawn and a petition to amend the counterclaim[2/] to join Rocket as a party liable to Garlam was granted. Rocket then filed a Motion to Dismiss for lack of personal jurisdiction alleging that since it had no contacts with this forum prior to

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(Continued from previous page.)

(c) Transfer of interest. . . . Service of the motion shall be made as provided in subdivision (a) of this Rule. . . .

2/ Although referred to as a third-party complaint, the pleadings reveal that Garlam's amended complaint is in reality an amended counterclaim joining Rocket as counterdefendant with Explo, Excoa and General Insurance Company of America; see: R. 13(h) Fed. R. Civ. P.

acquiring Explo's interest in this action, the order permitting its joinder as a party liable to Garlam constitutes a violation of the due process principles outlined in International Shoe Co. v Washington, 326 US 310 (1945), particularly since Explo, its predecessor, had already been found liable to Garlam. See: Partial Judgment issued on April 4, 1976. It urges that this would be tantamount to a determination on the merits that it was the alter ego or corporate shell of Explo and, thus, responsible for the latter's liabilities. Finally, it is suggested that Rocket was not properly served and that, assuming arguendo that Garlam's allegations are true, dismissal of the amended counterclaim is warranted under the doctrine of forum non conveniens. The affidavit of Dr. George S. Sutherland, movant's

Chairman of the Board and Chief Executive Officer, filed in support of dismissal states that in 1973 Explo was merged into Excoa which was dissolved in 1976 and that it conveyed its assets to Rocket[3/] in partial satisfaction of its debts.

3/ In 1973, Excoa, Inc. was formed as a Washington Corporation for the purpose of developing and manufacturing explosives and all forms of chemicals. Shortly thereafter, Explo was merged into Excoa, Inc. The merger was undertaken by a short form merger procedure through which the sole shareholder of Excoa, Inc., bought out the interests of Explo shareholders. Since there was no public market for the stock, the offering price was based upon a valuation made by an independent consultant. From 1973 to until the time of its dissolution, Excoa, Inc. was maintained distinct from Rocket, with the business of the two companies continuing to be separate; Rocket continued in the rocket engine and propellant business and Excoa attempted to remain in the explosives business. At the time of Excoa's dissolution in 1976, Excoa owed Rocket several millions of dollars as a result of its losing operations. As partial satisfaction of those debts, Excoa conveyed its assets in partial satisfac-

(See next page.)

Rocket's Motion to Dismiss was initially denied but, upon reconsideration, it was decided that there was no personal jurisdiction over it and the action against it was dismissed. In its revised ruling the court emphasized that most of the alleged contacts with the forum were not supported by the record and that others were irrelevant--for example, that Rocket was paying the attorney's fees for Explo's defense in this action--since they occurred in 1976 after Rocket had acquired the cause of action and not when the suit was instituted. Dragor Shipping Corp. v Union Tank Car Co., 361 F.2d 43 (7th Cir. 1966) cert. denied Union Tank

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(Continued from previous page.)

tion of such obligations. However, due to the financial condition of Excoa, no distribution of assets could be made to Rocket as a shareholder of Excoa. (Affidavit of George Sutherland pp. 3 and 4.)

Car Co. v Dragor Shipping Corp., 385 US 831, was cited in support of the proposition that personal jurisdiction over a party must exist at the time the complaint is filed and cannot be acquired by later contacts with the forum. Thereafter, Garlam filed a motion for reconsideration which was opposed by Rocket. However, the court by footnote order of December 28, 1979, determined that the motion for reconsideration was moot since Garlam had already appealed the dismissal order.4/ On May 27, 1981 Garlam requested that the motion for reconsideration be reinstated. The matter concerning the request to reconsider was referred to Chief Judge Pesquera who

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4/ The appeal was dismissed for lack of appellate jurisdiction on December 10, 1979. Garlam contends that this footnote order was never notified and there is no indication in the record that it was.

subsequently disqualified himself. The parties then filed other motions requesting reinstatement of the motion, on the one hand, and dismissal as moot and untimely, on the other.

If we consider the procedural framework against which the court was determining the issue of personal jurisdiction, the findings and legal standards contained in its order are correct. By focusing the matter as a request to amend the counterclaim to add a new party responsible to Garlam on the merits of a prior determination of contractual liability in its favor, the conclusion that there was no personal jurisdiction over Rocket was correct. If one considers the possible retroactive effect of the amended counterclaim, the lack of any indication as to Rocket's involvement with this forum prior to the transfer of

assets, and the fact that liability had already been determined, the court, if it was to reconcile its ruling with the due process considerations of International Shoe and its progeny (see: World-Wide Volkswagen Corp. v Woodson, 444 US 286 (1980), had no alternative but to dismiss. As Rocket correctly contends, to have ruled otherwise would have entailed a determination without any type of hearing that Rocket was Explo's alter ego all throughout. Viewed within the procedural backdrop of Garlam's request, the determination that there was no personal jurisdiction over Rocket so as to join it as a party according to the criteria of Rules 13(h), 15, 17 and 19, Federal Rules of Civil Procedure, that is, directly liable to Garlam on the action for breach of contract for the reasons already determined by Judge Bootle, the order of

October 29, 1979 is entirely correct and reconsideration is unwarranted. If the issues, however, had been defined within the context of a Rule 25(c) substitution[5/] the ensuing consequences as well as the court's determination, would have been different.

In considering the propriety of a Rule 25(c) substitution it is of paramount importance to recognize that the substitution or joinder does not affect the substantive rights of the transfer[or] or of the transferee.

5/ Garlam contends that it abandoned its request for substitution at the request of Judge Pesquera. There is nothing in the record to sustain this. We must assume that these decisions are voluntarily made and that counsel understand the consequences of the procedural strategy they wish to follow.

Television Reception Corporation v Dunbar, 426 F.2d 174, 178 (6th Cir. 1970): Federal Deposit Ins. Corp. v Tisch, 89 FRD 446, 448 (EDNY 1981). This consideration is essential in order to understand that the possible substitution of Rocket as Explo's transferee is not a determination of Rocket's liability. In the first place, as both Explo and Rocket have suggested, it would be hasty to arrive at this conclusion at a moment when we do not know if Explo will not satisfy the judgment. Of yet greater importance are the possible violations to the due process clause that such a determination would entail if made without an adequate hearing. Likewise, it is necessary to realize that the answers to the question of Rocket's liability are not found in the court's decision concerning Explo's contractual liability to Garlam,

but rather, are best approached by examining the applicable criteria to determine in what situation a transfer of corporate assets also includes the transfer of the corporation's liabilities.6/ This is so for Rocket was brought to this action as a possible successor in interest of Explo which would be liable to Garlam on the basis of the judgment and not on the basis of the contractual rela-

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6/ Without advancing the applicable law to the present circumstances we note that the general view is that when one corporation sells or otherwise transfers all of its assets to another corporation the latter is not liable for the debts and liabilities of the transferor, except if the purchaser expressly or impliedly agreed to assume such debts, if the transaction amounts to a consolidation or merger of the corporations, if the purchasing corporation is merely a continuation of the selling corporation or if the transaction is entered into fraudulently to avoid liability. R.J. Enstrom Corp. v Interceptor Corp., 555 F.2d 277, 281-2 (10th Cir. 1977).

tionship liability that originated the case.

In Panther Pumps & Equipment Co. v Hydrocraft, Inc., 566 F.2d 8 (7th Cir. 1977) cert. denied Beck v Morrison Pump Co., 435 US 1013 (Panther Pumps), the district court accepted the argument raised by a party brought under Rule 25(c) that to join it would violate the due process clause since judgment had already been entered. The appellate court reversed stating that the lower court had misconceived the charge against the party to be substituted and the reasons for bringing him to the action at that stage, stating:7/

> Beck, in the motion to substitute, was not charged with 'the original patent infringement.'

7/ Opinion by Howard Thomas Markey, Chief Judge of the United States Court of Customs and Patent Appeals, sitting by designation.

> Beck was charged with acts by which he became the successor in interest of Hydrocraft, a judgment debtor. The nature of the original tort that resulted in the judgment is immaterial. It could have been libel, slander, assault, battery, patent infringement or some other tort. The charge was (and is) that Beck is the successor in interest of the judgment and debtor and therefore liable on the judgment. Against this charge Beck was entitled under the Due Process Clause to an opportunity to defend himself. Id. at 24.

The Court then determined that Beck had that opportunity at the hearing where the charge that he was defendant's successor in interest was fully discussed. The question of personal jurisdiction in this case, viewed in its proper perspective, is not one of determining whether personal jurisdiction over the party to be substituted existed since the filing of the complaint but rather whether the reasons adduced for a Rule 25 substitution

are sufficient to persuade the court[8] that at this stage of the proceedings there is cause to issue an order to bring into the action the party to be substituted[9] and then to determine if

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8/ On the matter of the exercise of discretion in granting a Rule 25 substitution see: Prop-Jets, Inc. v Chandler, 575 F.2d 1322, 1324 (10th Cir. 1978) and Froning's Inc. v Johnston Feed Serv., Inc., 568 F.2d 108, 110 n.4 (8th Cir. 1978); cf. United States v F.D. Rich Company, 437 F.2d 549 (9th Cir. 1970) (ample discretion to substitute parties where a corporate dissolution or some other act affecting the capacity to sue has occurred).

9/ In a similar fashion, a court may accept as a legal fiction subject to later challenge that specific allegations of a complaint as to an out of state parent corporation officer's negligent acts are sufficient to determine at an early stage in the proceeding that personal jurisdiction exists and that the Court has authority to summon that party, see: Escude Cruz v Ortho Pharmaceutical Corp. 619 F.2d 902 (1st Cir. 1980). It has also been recognized as an inherent attribute of a court that it has the power or authority to determine jurisdiction. See generally: 13, C. Wright, A. Miller and E. Cooper, Federal Practice and Procedure, Sec. 3566 (1975 ed.).

substitution is proper. The crucial period then to determine as to when personal jurisdiction over the substituted party must exist is at the moment when substitution is requested.

The two cases that Rocket has brought to our attention which discuss issues related to the present situation do not support the proposition that personal jurisdiction must exist over the party to be substituted since the filing of the complaint. In Panther Pumps, the court denied the motion for substitution of a corporation (Universal) that had received the assets of defendant corporation Hydrocraft because it faced the "insurmountable obstacle" of lack of personal jurisdiction. Id. at 23. However, this holding, when examined in its particular factual situation, does not necessarily govern our decision today. In

that case the court did impose liability of the judgment-debtor upon a successor[10] thus, allowing plaintiff to obtain an effective judgment, whereas in our situation there is a real possibility that Explo's assets may be insufficient to cover part of Garlam's judgment and that there would be no other entity or person from whom recovery can be had. Panther Pumps merely states that the district court had not acquired jurisdiction. The reasons why the trial court did not exercise personal jurisdiction over Universal,[11] while doing so as

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10/ Mr. Louis Beck (Beck) whom the Court found to be Hydrocraft's successor in interest.

11/ The court said at page 23:

> The motion to substitute Universal faces an insurmountable obstacle: lack of personal jurisdiction. 'The consistent constitutional rule has been that a

(See next page.)

to Beck, were not discussed nor was any explanation given as to why there was no personal jurisdiction over the corporation. All that was said was that the lower court's order was only directed to Beck and did not include Universal. The lack of elaboration in Panther Pumps on this particular matter serves to provide little, if no guidance.

In any event, it should be noted that the district court's decision on the matter of substituting parties under Rule

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(Continued from previous page.)

court has no power to adjudicate a personal claim or obligation unless it had jurisdiction over the person of the defendant.' Zenith Radio Corp. v Hazeltime Research, Inc., 395 US 100, [sic] 110, 89 S.Ct. 1562, 1569, 23 L.Ed. 2d 129 (1969). The district court's order to show cause was directed only to Beck, it did not bring Universal before the lower court. Although we have held, supra, that Universal is merely Beck's alter ego, that fact cannot alone confer personal jurisdiction over Universal.

25(c) was taken after a two week evidentiary hearing. Id. at 24. In contrast to our case, an opportunity was given to fully discuss the arguments and to present evidence in support of the need to substitute. Also significant is the fact that, although the Circuit Court felt that it was unnecessary to rule on the lower court's determination of personal jurisdiction over Beck,12/ the facts of that case reveal that Beck was not an original defendant and that the court acquired personal jurisdiction over him because of acts he committed after the complaint was filed. The other case relied upon by Rocket, Ransom v Brennam,

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12/ "Respecting Beck, however, the lower court held that it had personal jurisdiction over Beck and he has not appealed that ruling. It is res judicata that the order to show cause was properly issued by the district court and that it subjected Beck to the district court's jurisdiction. . . ." Id.

437 F.2d 513 (5th Cir. 1971), cert. denied 403 US 904 (Ransom), serves only to further strengthen the position that personal jurisdiction over a substituted party does not necessarily have to exist from the moment the complaint is filed. In Ransom, after the defendant died plaintiffs moved to substitute the decedent's executrix pursuant to Rule 25(a)(1). The executrix was notified according to Rule 5, Fed. R. Civ. P., by mailing the motion to decedent's attorney. The court found the notice improper and dismissed the motion for substitution. The question was posed as to what a court "having subject matter jurisdiction must do to obtain personal jurisdiction over the party sought to be substituted. . . ." Id. at 516. It was held that, in order for the court to acquire personal jurisdiction, Rule 4,

Fed. R. Civ. P., had to be used when the party to be substituted had not previously appeared in the action. Discussing the trial court's reliance on the holding of Butsch v Canterbury, 18 FRD 23 (SDCal. 1955), to the effect that once personal jurisdiction was acquired over the original party it continued over the substituted party, the Circuit Court commented:

> If this second clause is construed otherwise, as a statement that in personam jurisdiction over the original party so continues over the party named as a potential substitute as to subject him to the power of the court without the necessity of service of process, then in our opinion it is wrong, and we decline to adopt any such principle. Ransom at 518.

Thus, Ransom stands for the proposition that if the substituted party has never before appeared he must be served pursuant to Rule 4, Fed. R. Civ. P. To infer

from this holding what Rocket pretends is a misinterpretation. On the contrary, the court in Ransom suggested that it could acquire personal jurisdiction over the executrix by the proper service of summons even though she had no relationship or contacts with the forum. It interpreted the wording in Rule 25(a)(1) permitting service of the motion and notice of hearing "in any judicial district" and Rule 4(f) Fed. R. Civ. P., which provides that service of process may be made beyond the territorial limits of the state in which the district court is held when authorized by the rules, to support its authority to serve summons outside its territorial limits. However, since the executrix had not been summoned properly the motion for substitution was denied. In any event, Rocket's involvement with our forum upon acquiring an

interest in an ongoing judicial proceeding and the fact that it is paying for Explo's attorney's fees in this action,[13] coupled with the real possibility that a party could be deprived of its right to obtain an effective judgment, are more than sufficient, even assuming the dubious minimum contacts requirement, to determine if substitution should be made and to consider if Rocket is liable as a successor in interest. See: American Renaissance Lines, Inc. v Saxis Steamship Co., 71 FRD 703, 705 EDNY 1976); Wainwright v Kraftco Corporation, 58 FRD 9, 13 (NDGa. 1973). Rocket's voluntary decision to acquire Explo's

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13/ Although the Court mentioned in its order of October 29, 1979 that this fact was not adequately proven, counsel for Explo, later admitted by sworn statement that Rocket had been paying the attorney's fees incurred in this action since it acquired the interest.

interests in this litigation and to monitor its course by paying the attorneys afforded it sufficient actual notice of the exact nature and complexities of the case and of the probable risks in order to prepare itself beforehand for the reasonable anticipation of being brought into the action as a successor in interest. Thus, any possible violations to the due process clause are absent. See: World-Wide Volkswagen Corp. v Woodson, 444 US 286, 292 (1980) and Keeton v Hustler Magazine, No. 81-1489, slip op. at 2 (1st Cir., June 16, 1982).

Therefore, although the order dismissing the amended counterclaim was correct within the procedural framework that the court utilized, we deem that fairness requires that Garlam be given an opportunity to move for a Rule 25 substitution, if the circumstances so

dictate.[14] Both parties must be given an opportunity to gather information and explore the issue of liability thus framed and to present their position as to the applicable law on corporate liability; see note six, the convenience of the forum, the possibility of a transfer, the type of summons required or whatever other arguments they deem relevant to the situation. We forewarn Garlam that if it decides to request substitution it must adequately support its motion,[15] and, in view of our rather extensive consideration of these issues, we expect Garlam, as well as the other parties, to come

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[14] If Explo assets are insufficient to satisfy that part of the judgment exceeding the policy, for example.

[15] Cf. Marcano v Offshore Venezuela, C.A., 497 F. Supp. 204 (EDLa. 1980) (individual seeking to prosecute action as legal representative of deceased had to make proper showing to that effect before Rule 25(a) substitution was granted).

forth with well researched and adequately grounded positions. We are painfully aware that the end result of this ruling may well be an additional dilation of this ten year old case, yet to leave the matter as it stands is a blow to fairness[16/] and by doing so we would be inviting more delay and appeals.

Accordingly, the Motion for Reconsideration is DENIED. Defendant counterclaimant Garlam is ORDERED to file within fifteen (15) days after notice of this Order a motion for substitution in accordance with Rule 25(c) Fed. R. Civ. P., at which time the Court shall order that summons be served on Rocket and thereafter a hearing shall be held to

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16/ It is only fair to at least permit Garlam to enter the "dark and dismal forest known to all as the corporate reshuffle." Moody v Albemarle Paper Company, 50 FRD 494 (EDNC 1970).

determine if Rocket is in fact the successor in interest of Explo, Garlam's judgment debtor.

SO ORDERED.

At San Juan, Puerto Rico, on November 16, 1982.

CARMEN CONSUELO CEREZO
United States District Judge

73545/A-1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

EXPLOSIVES CORPORATION OF AMERICA,	)	
Plaintiff	)	CIVIL
vs	)	72-0001 CC
GARLAM ENTERPRISES CORPORATION AND FEDERAL INSURANCE COMPANY	)	
Defendants	)	

MOTION FOR SUBSTITUTION OF PARTY
PURSUANT TO RULE 25(C) OF THE
FEDERAL RULES OF CIVIL PROCEDURE

TO THE HONORABLE COURT:

COMES NOW defendant, GARLAM ENTERPRISES CORPORATION, and respectfully sets forth:

1. That this Court substitute the name of plaintiff, Explosives Corporation of America, for Rocket Research Corporation, now called Rockcor, Inc. (hereinafter called Rockcor).

2. That substitution is proper, pursuant to the provisions of Rule 25(c), of the Federal Rules of Civil Procedure because:

a) Plaintiff herein, Explosives Corporation of America, is no longer a legal entity and has no assets with which to pay a judgment;

b) Rockcor, through its continuous conduct and acts, has become the successor in interest of plaintiff herein, Explosives Corporation of America;

c) Rockcor is the successor, assignee, or guarantor of Explo and thus a proper party for substitution.

3. A supporting brief is attached hereto.

WHEREFORE, Garlam Enterprises Corporation respectfully prays this Honorable Court that:

a) It order the name of plaintiff and counter-defendant to be substituted by the new party in interest, Rockcor, Inc. in all pleadings and writings that have been filed in this court, and;

b) That it order the Clerk of this Court to issue summons against Rockcor so that same may be served upon Rockcor, with a notice of hearing, pursuant to Rule 4 of the Federal Rules of Civil Procedure, along with copy of this Motion for Substitution of Parties.

c) That Rockcor be ordered to appear for a hearing before this Court to

set forth its opposition for the substitution, if any there should be.

At San Juan, Puerto Rico, this 15th day of December, 1982.

I HEREBY CERTIFY that a true copy of this document has been mailed to Salvador Antonetti, Esq. c/o Fiddler, González and Rodríguez, G.P.O. Box 3507, San Juan, Puerto Rico 00936.

Respectfully submitted,

CORDERO, COLON & MIRANDA
P.O. Box S-1581
Old San Juan,
Puerto Rico 00903
Tels: 721-5554 & 721-5750

By: [signed]
CHARLES A. CORDERO

73545/A-2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 83-1218

EXPLOSIVES CORPORATION OF AMERICA

Plaintiff

-vs-

GARLAM ENTERPRISES CORPORATION,
et als.

Defendants and Third Party
Plaintiffs, Appellees

MOTION TO DISMISS FOR LACK OF
APPELLATE JURISDICTION

TO THE HONORABLE COURT:

COMES NOW appellee, Garlam Enterprises Corporation, and respectfully sets forth:

1- That attached hereto is a copy of the Order entered below on February 18, 1983[1/] which appellants mention in their

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1/ Said order is marked as Appellee's Exhibit I.

"Statement Pursuant to Local Rule 8(a)" dated March 29, 1983.

2- That pursuant to the Order of the court below, it is clear that this court lacks jurisdiction since the judgment was entered on November 16, 1982, and the notice of appeal was not filed until March 17,1983.

3- In the alternative appellee pleads that the judgment entered by the court below is not a "final decision" since the judgment appealed does not contain the certification required under Rule 54(b), F.R.Civ. P., in that there are claims which affect the rights of the parties pending resolution by the court below. Therefore, this court lacks appellate jurisdiction since a final order has not been entered. See Coulter -vs- Sears Roebuck & Company (5th Cir - 1969) 411 F2 1189; A.O. Smith Corporation -vs- Sims

Consolidated Ltd. (10th Cir - 1981) 647 F2 118.2/

4- That the conduct of appellant mandates attorney's fees and costs since the appeal can only be considered as evidence of further delay tactics used by appellants. This case involves an action which was first filed in January 1972 and appellees (who are counter-claimants) have been seeking relief since that time.

WHEREFORE, appellees pray this Honorable Court that the appeal be dismissed for lack of appellate jurisdiction.

At San Juan, Puerto Rico, this _____ day of April 1983.

I CERTIFY that a copy of the foregoing has been mailed to: Salvador

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2/ Copy of Judgment is attached as Exhibit II for Appellee.

Antonetti, c/o Fiddler, González & Rodríguez, GPO Box 3507, San Juan, Puerto Rico 00936; Oles, Morrison, Rinker, Stanislaw & Ashbaugh, 3208 Seattle First National Bank Bldg., Seattle, Washington 98154.

Respectfully submitted,

CORDERO, COLON & MIRANDA
P.O. Box S-1581
Old San Juan,
Puerto Rico 00903
Tels: 721-5554 & 721-5750

By: [signed]
CHARLES A. CORDERO

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